Supreme Court, U.S.
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93-737

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KENT ANDREW FOLLETTE, JANE ELIZABETH FOLLETTE, INDIVIDUALLY AND AS NEXT FRIENDS OF ANDREW STEPHENSON FOLLETTE, A MINOR CHILD,

Petitioners,

v.

CLAIROL, INC. AND WAL-MART STORES, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an out-of-state corporation that obtains a license to do business, designates an agent for service of process and conducts substantial business in a state thereby consents to that state's exercise of "general" personal jurisdiction for causes of action unrelated to the corporation's activities in the state, or does the Due Process Clause of the Fourteenth Amendment, in such a situation, limit a state's permissible scope of personal jurisdiction to only forum-related causes of action i.e. "specific" jurisdiction?

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Petitioners,

v.

CLAIROL, INC. AND WAL-MART STORES, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI[1]

Petitioners, Kent Andrew, Jane Elizabeth "Libby", and Andrew "Andy" Follette ("Follettes") respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the Summary Judgment of the United States District Court for the Western District of Louisiana.

OPINIONS BELOW

The unreported decision of the United States Court of Appeals for the Fifth Circuit is reproduced in the Appendix ("App.") at la to 2a. The unreported decision and judgment of the United States District Court for Western Louisiana is reproduced at App. 3a to 15a and 18a to l9a.

[1]No list of parties to the proceeding in the court whose judgment is sought to be reviewed is necessary because the names of all parties appear in the caption of the case.

JURISDICTION

The Fifth Circuit Judgment and opinion was rendered on July 16, 1993. Petitioners timely filed a Petition for Rehearing which was denied on August 10, 1993. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The applicable Texas Statutes, V.A.T.S. Bus. Corp. Act Art. 8.08 and V.T.C.A. Civil Practice and Remedies Code §71.031, are set forth verbatim; V.A.T.S. Bus. Corp. Act, Arts. 2.02, 8.02 and 8.10 are set forth in pertinent part here and verbatim at App. 24a to 29a. The Due Process Clause of the Fourteenth Amendment is also set forth.

Article 8.02, *Powers of Foreign Corporation,* of the Texas Business Corporation Act states in pertinent part:

> "A. A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked in accordance with the provisions of this Act or until a certificate of withdrawal shall have been issued by the Secretary of State as provided in this Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, as to all matters affecting the transaction of intrastate business in this State, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like character and its officers and directors;"

V.A.T.S. Bus. Corp. Act, Art. 8.02 (Vernon Supp. 1991)

Article 2.02, *General Powers,* of the Texas Business Corporation Act states in part:

> "A. Subject to the provisions of Sections B and C of this Article, each corporation shall have power:
>
> . . .
>
> (2) To sue and be sued, complain and defend, in its corporate name."

V.A.T.S. Bus. Corp. Act, Art. 2.02 (Vernon Supp. 1991).

Article 8.08, *Registered Office and Registered Agent of Foreign Corporation,* under the act states as follows:

> A. Each foreign corporation authorized to transact business in this State shall have and continuously maintain in this State:
>
> (1) A registered office which may be, but need not be, the same as its place of business in this State.
>
> (2) A registered agent, which agent may be either be an individual resident in this State whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office.

V.A.T.S. Bus. Corp. Act, Art. 8.08 (Vernon Supp. 1991)

Article 8.10, *Service of Process on Foreign Corporation,* under the Act states as follows:

> "A. The president and all vice presidents of a foreign corporation authorized to transact business in this State and the registered agent so appointed by a foreign corporation shall be agents of such corporation upon whom any process, notice, or demand required or permit-

> ted by law to be served upon the corporation may be served."
>
> . . .
>
> "D. Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law."

V.A.T.S. Bus. Corp. Act, Art. 8.10 (Vernon Supp. 1991)

Section 71.031, *Acts or Omission Out of State* under the Texas Civil Practice and Remedies Code provides:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
>
> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
>
> (b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

V.T.C.A. Civil Practice and Remedies Code §71.031.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall . . . deprive any person of life, liberty or property, without due process of law;

U.S. Const., Amend. XIV §1.

STATEMENT OF THE CASE

This is a product liability action against Clairol and Wal-Mart, the manufacturer and retailer of the product, a one gallon jug of hairspray. Federal Court jurisdiction is predicated upon diversity of citizenship, 28 U.S.C. §1332.[1]

The Respondents, Clairol and Wal-Mart, have been licensed to do business and have conducted substantial business in Texas since 1959 and 1974 respectively. The issue of this petition, simply put, is whether obtaining a license to do business and designating an in-state agent for service of process allows a state to entertain personal jurisdiction over an out-of-state corporation for suits unrelated to its activities in the state.

The Texas Business Corporation Act and Texas case authority permit "general" personal jurisdiction over foreign corporations under the theory that licensed out-of-state corporations have "consented" to the "general" personal jurisdiction of Texas Courts. The Fifth Circuit, however, held that exercising *in personam* jurisdiction in such a manner runs afoul of the Due Process Clause of the Fourteenth Amendment. It is on the basis of these facts and for the reasons stated herein that Petitioners seek review and relief.

Facts and Proceedings Below

On August 21, 1989 a one gallon jug of Clairol "Final Net" hairspray exploded in the Ruston, Louisiana home of Kent and Libby Follette. In the ensuing fire, their son, eleven-year-old Andy Follette, was burned over 80% of his body. In critical condition, he was rushed to the Louisiana State University Medical Center Burn Unit in Shreveport, Louisiana where he received extensive and prolonged medical treatment. Andy underwent numerous surgeries and re-

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[1] Petitioners, the Follettes, are citizens and residents of Louisiana. The Respondents, Clairol, Inc. and Wal-Mart Stores, Inc., are both Delaware corporations with their principle places of business in New York and Arkansas, respectively.

mains severely disfigured. Petitioners contend the hairspray jug, manufactured by Clairol and sold by Wal-Mart, is defectively designed and marketed and unreasonably dangerous to consumers and caused the fire and injuries. This occurrence forms the factual basis of this lawsuit.

The Follette family, unaware of any potential claim at the time of Andy's injury, did not retain an attorney until after the one-year Louisiana prescriptive statute – Louisiana's version of a statute of limitations – had lapsed.[2] Shortly before the second anniversary of the fire, Follettes hired counsel and determined that diversity of citizenship existed and decided to file the case outside the State of Louisiana and in a venue where the action would not be time-barred and where both Respondents could be jurisdictionally "found". They chose the United States District Court for the Eastern District of Texas, Marshall Division, Marshall, Texas. This was done for three primary reasons. First, both Respondents, Clairol and Wal-Mart, the manufacturer and retailer of the product, were licensed to do business in Texas, had designated an agent for service of process and had conducted substantial business in Texas.[3] Under prevailing Fifth Cir-

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[2]Louisiana's prescription statute operates as a bar to untimely civil prosecution and is not tolled for infancy or incompetency of the Plaintiff. See La. Code Civ. P. Art. 3492 (1990)

[3]*Most* important, *the Louisiana Federal District Court in this case specifically* found that each defendant had "continuous and substantial" contacts with Texas. See App. lOa - lla. They are both authorized to do business in Texas. As required by law, they have appointed agents for service of process in Texas. Wal-Mart's additional contacte with Texas include:

1. Operation of approximately 264 large scale retail outlets in Texas;
2. Deriving substantial income from the sale of goods in Texas;
3. Ownership of real and personal property located in Texas;
4. Ownership of a Texas corporation; and
5. Employment of a substantial number of Texas residents.

Clairol's contacts with Texas include:

1. Location of a business office in Texas;
2. The location of division regional offices in *Texas;*
3. Ownership of personal property located in Texas;
4. Payment of Texas property taxes;
5. Deriving substantial revenue from the sale and marketing of its products in Texas; and
6. Payment of Texas franchise taxes.

cuit and Texas law the Respondents had "consented" to the "general" personal jurisdiction of Texas, see *Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982) and *Goldman v. Pre-Fab Transit Co.*, 520 S.W. 2d 597 (Tex. App. - Houston [14th Dist] 1975). Second, the site of the District Court at Marshall, Texas lies geographically near the border of Louisiana and, hence, that Federal Court's subpoena range extends to include both the Ruston and Shreveport, Louisiana areas where most of the witnesses live. Finally, Texas enjoys a two-year statute of limitations for tort actions which is available to non-resident plaintiffs. See V.T.C.A. Civil Practice & Remedies Code §§ 16.003 and 71.031.

Thereafter, on August 12, 1991 the Follettes timely filed a diversity action in the United States District Court for the Eastern District of Texas. This suit against Clairol and Wal-Mart alleged tort theories based upon (a) strict product liability, and (b) negligence. Service of process was obtained upon both Clairol's and Wal-Mart's in-state agents.

Soon after the Follettes filed their suit in Texas, Clairol and Wal-Mart challenged that Court's personal jurisdiction over their corporate entities. The Respondents each moved the Court, under 28 U.S.C. §1406(a), for a dismissal of the lawsuit for lack of personal jurisdiction or, in the alternative, a transfer to Louisiana. They claimed Texas lacked sufficient "minimum contacts" with the Respondents to justify "general" personal jurisdiction over them.

The Texas Federal District Court, after evaluating the jurisdictional facts and existing law, issued two four-page written orders overruling each Respondents' Motion to Dismiss or Transfer and found that each corporation had, under the law of Texas, "consented" to the "general" personal jurisdiction of Texas by obtaining certificates of authority to transact business under the Texas Business Corporation Act and designating in-state agents for service of process. Thus, the Texas Federal District Court found it unnecessary to analyze the extent of Respondents' "contacts" with Texas. The Court did, however, under 28 U.S.C. §1404(a) rather

than 1406(a), transfer the case to the United States District Court for the Western District of Louisiana in Shreveport.[4,5]

Two months after the transfer of the Follettes' case to Federal Court in Louisiana, the United States Court of Appeals for the Fifth Circuit authored its opinion in *Siemer v. Learjet Acquisition Corp.*, 966 F. 2d 179 (5th Cir. 1992) *cert denied,* 113 S.Ct. 1047 (1993). This intervening decision of the Fifth Circuit reversed the Court's holding in previous cases and pronounced the Court's new view that due process considerations prevented business registration and designation of an agent for service of process as forming the basis for "consent" to the exercise of "general" personal jurisdiction over an out-of-state corporation.

Clairol and Wal-Mart, on the basis of the *Siemer* decision, renewed their attack on personal jurisdiction by now moving for a summary judgment. They contended that since *Siemer* changed the status of the law, the Louisiana Federal Court was now free to disregard the Texas Federal Court's previous finding on the issue of personal jurisdiction, and simply apply Louisiana procedural law and enter a summary judgment based on the Louisiana prescriptive statute.[6]

The Louisiana Federal Court agreed with the Respondents and granted the Respondents' Motions for Summary Judgment and, based on a sixteen-page report by the United

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[4] The Louisiana Court, however, would still have been bound to apply the Texas Statute of Limitations rather than its own prescriptive period. See *Ferens v. Deere & Co.*, 110 S.Ct. 1274, 492 U.S. 1212, 106 L.Ed. 2d 644 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed. 2d 945 (1964); *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

[5] It must be noted that Follettes never sought a transfer to Louisiana but were satisfied to prosecute their claim in Texas or any jurisdiction where it would not be time-barred. Much discussion was had on this issue during oral argument on the Motions in the Texas Federal Court.

[6] Follettes contended the "Law-of-the-Case" doctrine prevented reconsideration of the jurisdictional issue but the District Court found the intervening *Siemer* decision to be that type of exceptional circumstance that warranted a deviation from the "Law-of-the-Case" doctrine.

States Magistrate[7], reversed the Texas Federal Court's finding on the issue of personal jurisdiction and held that it would be a violation of the Due Process Clause of the Fourteenth Amendment if states were permitted, through the Doctrine of Consent to Jurisdiction, to obtain "general" personal jurisdiction over out-of-state corporate defendants for causes of action unrelated to the corporation's activities in the state. The Court held that under the aegis of the Due Process Clause a "fair" and "reasonable" place to "draw the line" on a State's permissible exercise of "general" personal jurisdiction should be limited to: (1) the state of incorporation, and (2) where the corporation's principle place of business is located. Thus, the Court found that Texas had not initially acquired personal jurisdiction over the Respondents and under Louisiana procedural law the Follettes' cause of action was time-barred. Consequently, the Court entered a Summary Judgment against the Follettes dismissing all of their claims with prejudice.

On Appeal, the United States Court of Appeals for the Fifth Circuit adopted both the reasoning of the United States Magistrate and the decision of the District Court and affirmed the Summary Judgment of the District Court while favorably citing their previous holding in *Siemer,* supra.

The ultimate effect of the Texas Federal Court's 1404(a) transfer was to transfer the case to procedural doom. It was not transferred to a court where the action "could have been brought", considering the statute of limitation problem, but transferred to a court where it was dismissed with prejudice. Both the Louisiana District Court and the Fifth Circuit were asked to reconsider the separate "interest of justice" requirement and finding contained in the Texas Federal Court's 1404(a) transfer, both courts refused to consider or address this issue.

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[7]See 28 U.S.C. §636 (6) (1) (B) .

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH OTHER UNITED STATES COURTS OF APPEAL.

A threshold inquiry in personal jurisdiction cases is whether a corporate defendant is licensed to do business in the forum state. For example, this Court in *Helicopteros Nacionales de Columbia. S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed. 2d 404 (1984) made reference no less than three times to the single fact that the *Helicopteros* defendant was not licensed to do business in Texas. The importance of this fact is seldom discussed by either the Supreme Court or the various Courts of Appeal and there exists a direct conflict between the Courts of Appeal over the significance of a foreign corporation's license to do business and designation of an agent for service of process. Two distinct viewpoints now prevail and only this Court can resolve the conflict between these views.

The Third, Eighth and, until recently, the Fifth Circuits adhered to the proposition that an out-of-state corporate defendant, that is licensed to do business in a state and has designated an agent for service of process, may be considered to have "consented" to that state's exercise of personal jurisdiction even for causes of action unrelated to the defendant's activities in the state. In other words, "general" personal jurisdiction could be exercised under the theory of consent to jurisdiction and the Due Process Clause is not violated by the corporate statutes of the states in these circuits .[8] Petitioners subscribe to this line of cases .

The rationale behind the theory of consent is that in return for the privilege of doing intrastate business, and enjoying the same rights and privileges as a domestic corporation, the foreign corporation has consented to amenability to jurisdic-

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[8]Some state's do limit their jurisdiction to only in-state activities. Texas does not so limit their Courts' jurisdiction. *cf. Knowlton v. Allied Van Lines*, infra.

tion for purposes of all lawsuits within the state. This is true regardless of where the cause of action arose, so long as the action is transitory and not local. See *Goldman v. Pre-Fab Transit Co.*, supra.

The Eighth Circuit in the leading case of *Knowlton v. Allied Van Lines*, 900 F.2d 1196 (8th Cir. 1990) explained the theory of consent to jurisdiction as follows:

> Consent is the other traditional basis of jurisdiction, existing independently of long-arm statutes. Personal jurisdiction, unlike subject-matter jurisdiction, is primarily concerned with fairness to individual parties. Objections to jurisdiction over the person may be waived, either expressly or by not asserting them in a timely manner. A defendant may voluntarily consent or submit to the jurisdiction of a court which otherwise would not have jurisdiction over it. See *Insurance Corp. of Ireland. Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.

Id. at 1199.

Likewise, the Third Circuit in *Bane v. Netlink. Inc.*, 925 F.2d 637 (3rd Cir. 1991) holds that an out-of-state corporation that applies for and receives authorization to do business in a state has "consented" to the general personal jurisdiction of the state, provided that state's statutes so allow or require such consent. The Due Process Clause is not offended by recognizing such consent.

> By registering to do business in Pennsylvania, Netlink "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus involving the benefits and protection of its laws.'" *Burger King Corp. v.*

> *Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85L.Ed.2d 528 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958) . . . . Consent is a traditional basis for assertion of jurisdiction long upheld as constitutional. See *Hess v. Pawloski*, 274 U.S. 352, 356-57, 47 S.Ct. 632, 633, 71 L.Ed. 1091 (1927); see also *Dehne v. Hillman Inv. Co.,* 110 F.2d 456, 458 (3d Cir. 1940) ("by applying for a certificate of authority and designating the Secretary of the Commonwealth as its attorney for process, ... We hold that because Netlink was authorized to do business in Pennsylvania, it was subject to the exercise of personal jurisdiction by Pennsylvania courts under section 5301(a)(2) (i) or (ii). The predecessor statute, section 2004(6), gave Netlink notice that was subject to personal jurisdiction in Pennsylvania and thus it should have been "reasonably able to anticipate being haled into court" in Pennsylvania.

Id. at 640 and 641.

Before the *Siemer* decision was handed down, the Fifth Circuit followed the same principles set forth in *Knowlton v. Allied Van Lines,* supra, and recognized the concept and rationale behind corporate "consent" to jurisdiction. In *Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982) the Court stated:

> We now consider whether Mississippi's exercise of jurisdiction is offensive to due process... [T]he question is whether it is fair and reasonable to compel the defendant to come into the forum to defend suit. Here, Ford has already come into Mississippi and voluntarily subjected itself to Mississippi process. It has agreed to be treated as a resident corporation. By appointing a resident agent and conducting

> substantial business in Mississippi it has consented to Mississippi's exercise of personal jurisdiction. It can hardly be considered unfair or unreasonable for Mississippi to use that authority.

Id. at 107.

On the other hand, the Fourth and now the Fifth Circuits share the view that qualification to do business in a state and designation of an agent for service of process by an out-of-state corporate defendant are but several factors that a court may consider in an overall "contacts" analysis to determine if an assertion of "general" personal jurisdiction is constitutionally proper. See *Siemer v. Learlet Acquisition Corp.*, supra. These Circuits fail to recognize such conduct alone as a constitutionally valid and independent means of obtaining personal jurisdiction over foreign corporations.

The opposing viewpoint posits that although an out-of-state corporation may have "consented" to the personal jurisdiction of a state by obtaining a license to do business and designating an in-state agent it would be constitutionally unfair and unreasonable to expect such consent to encompass all lawsuits even those unrelated to a corporation's activities in that particular state. Something more must be present to satisfy the Due Process Clause in these jurisdictions. These courts follow the proposition that the Due Process Clause limits a state's scope of permissible authority over foreign corporations to "specific" jurisdiction situations. "General" personal jurisdiction therefore is confined to only a few states such as the state of incorporation and the principle place of business or perhaps where "continuous and systematic" contacts might exist. See *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

The Fourth Circuit in *Ratliff v. Cooper Laboratories. Inc.*, 444 F.2d 745 (4th Cir. 1971) *cert. denied*, 404 U.S. 948, 92 S.Ct. 271, 30 L.Ed 2d 265 (1971) sums up the opposing viewpoint:

> "We think the application to do business and the appointment of an agent for service to fulfill a state law requirement is of no special weight in the present context. Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another."

Id. at 748.

What is unusual in the factual context of the present case is the expansive view of the Fifth Circuit. The District Court here found that Respondents did have "continuous" and "substantial" contacts with Texas and still felt the Due Process Clause was violated by permitting the exercise of "general" personal jurisdiction. None of the other circuits has yet went quite so far. This action, the District Court concluded, was supported by this Court's decision in *Helicopteros Nacionales de Columbia. S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed. 2d 404 (1984). See App. 13a. Petitioners suggest that the Fifth Circuit has exceeded the boundaries of the *Helicopteros* opinion and that obtaining a license to do business, designating an in-state agent for service of process, and actually conducting business is constitutionally sufficient to allow a state, such as Texas, to assert "general" personal jurisdiction over a corporate defendant.

In conclusion, these two views cannot both be correct. The Due Process Clause either prohibits "general" *in personam* jurisdiction in such a situation or it does not. Only the United States Supreme Court can decide this issue and it must be decided. Petitioners urge the Court to grant certiorari and consider and decide this important and troubling issue now.

II. THE UNITED STATES COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

The United States Supreme Court in *Neirbo Co. v. Bethlehem Shipbuilding Co.*, 308 U.S. 165, 60 S.Ct. 153, 84

L.Ed. 167 (1939) [and the cases cited therein] has recognized the constitutionality of asserting general personal jurisdiction over a defendant corporation by virtue of a state's statutory requirement that a corporation designate an agent for service of process. The Court upheld the constitutionality of such statutes as follows:

> In conformity with what is now §210 of the General Corporation Law of New York, Bethlehem designated "William J. Brown as the person upon whom a summons may be served within the State of New York." The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals, speaking through Judge Cardozo: "The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person 'upon whom the process against the corporation may be served.' . . . .
> . . . . A statute calling for such a designation is constitutional, and the designation of the agent "a voluntary act." *Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 61 L. ed 610, 37 S.Ct. 344.

Id. at 175.

Although cited and relied upon by Petitioners as appropriate authority before both the District Court and Fifth Circuit the applicability of this decision went unmentioned.

Many legal scholars view "consent" as an unwelcome and leftover remnant of the *Pre-International Shoe* era that has no or little practical value under modern notions of personal jurisdiction.[9] The contention being that consent is but an old

[9]See Wright and Miller, *Federal Practice and Procedure*: Civil 2d §1066.

legal fiction contrived to accomplish a necessary result before the concept of "minimum contacts" existed. Scholars sometimes fail to distinguish between "implied" consent and "actual" consent. State legislatures, however, through statutes governing the admission of foreign corporations to their states provide certain methods by which foreign corporations might become domesticated and acquire all those benefits and privileges accorded domestic corporations. The foreign corporation applying for a certificate of authority to transact intrastate business has such knowledge before it applies for admission. Indeed, one of the conditions of qualifying to transact business or being admitted to a state, is the designation of an agent for service of process and, with it, goes the actual consent to the *in personam* jurisdiction of the State's judicial system.

Texas attempts to acquire personal jurisdiction over foreign corporations to the fullest extent possible and views licensed out-of-state corporations as Texas residents and subject to the "general" personal jurisdiction of the State. See *National Trucker's Service. Inc. v. Aero Systems. Inc.,* 480 S.W.2d 455 (Tex. App. - Ft Worth 1992 writ ref'd n.r.e.); *Acacia v. Champlin Exploration Inc.,* 769 S.W.2d 719 (Tex. App. Houston [1st Dist.] 1989, no writ). It can hardly be said to offend the Due Process Clause or surprise anyone when a corporation, that has voluntarily and knowingly consented to a state's jurisdiction and provided a means by which such jurisdiction can be asserted, is called upon to defend a lawsuit in that state.

This Court has continually viewed such consent as a constitutionally proper method of obtaining *in personam* jurisdiction. Although the prudence of a state legislature opening its courts to transitory actions unrelated to forum activities may be questioned by some, the constitutionality of the practice has long been upheld. See *Neirbo,* supra and *Ex Parte Schollenberger,* 96 U.S. 369, 24 L.Ed. 853 (1878).

Petitioners contend as stated by the Eighth Circuit in *Knowlton,* supra, that consent is a traditional basis for

establishing personal jurisdiction. *Id.* at 1199. In defending the role of "physical presence" as a basis for jurisdiction, Justice Scalia in *Burnham v. Superior Court of California,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed. 2d 631 (1990) wrote:

> "[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that defines the due process standard of traditional notions of fair play and substantial justice."

Exactly the same thing is true of consent as a traditional basis of jurisdiction over the person. The Fifth Circuit has decided a federal question in conflict with *Neirbo* and other decisions. The viability of *Neirbo* as well as the theory of consent to jurisdiction being called into question it is now incumbent upon this court to either reaffirm or discard these principles.

III. THE UNITED STATES COURT OF APPEALS DECISION EFFECTIVELY HOLDS THE APPLICATION OF THE TEXAS BUSINESS CORPORATION ACT UNCONSTITUTIONAL AND IMPROPERLY RESTRICTS TEXAS' SOVEREIGN POWER.

The Texas Business Corporation Act governs the admission of foreign corporations to conduct intrastate business in Texas. As previously stated, Texas desires and attempts to assert "general" personal jurisdiction over its domesticated corporations. This is evidenced by the cited statutes and case law of Texas. The District Court, however, here opined:

> The forum state may have some general interest in the defendant's affairs because it is, to some extent, a participant in the state's economy and, possibly, the state's political process. But this interest is so slight and so inferior to the interests of other states that it lends little support to the argument that the exercise of general personal jurisdiction is fair and reasonable.

See App. B.

It is not, of course, within the District Court's authority to substitute its own judgment, for that of the State of Texas. The Federal District Court must confine its analysis to the constitutionality of Texas asserting *in personam* jurisdiction over the Respondents and not concern itself with federalism.

In a footnote to *Insurance Company of Ireland v. Compagnie des Bauxites de Guinee,* supra, Justice White stated the following concerning restrictions based on state sovereign power:

> [These restrictions] must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns.

102 S.Ct. at 2104-2105 n. 10, 456 U.S. at 702-703 n. 10.

The District Court and the Fifth Circuit have effectively established federalism as a separate concern in the analysis of personal jurisdiction. In so doing, the Court has impinged upon the sovereign power of Texas by declaring that Texas' statutes may not be applied in the precise manner that Texas desires. See *Acacia.,* supra.

Put another way, the Court here has found that Louisiana has some type of special sovereign ownership interest in this case because it occurred in Louisiana. Therefore, the Texas Business Corporation Act is unconstitutional and must be disregarded because it interferes with Louisiana's overriding interest to hear this dispute. Of course, personal jurisdiction matters invoke no such special concerns. Personal jurisdiction deals with a liberty interest and it is improper to consider federalism as a separate factor in a due process analysis.

The subtle proposition exercised by the Court here suggesting that personal jurisdiction may be somehow managed with an eye toward the competing interests of two states,

Texas and Louisiana, is disturbing because it carries personal jurisdiction away from the Due Process Clause into the area of federalism.

The Court should, for this additional reason, grant certiorari and address this issue and examine the propriety of using such reasoning in a personal jurisdiction analysis.

CONCLUSION

For these reasons a writ of certiorari should issue and the decision and order of the United States Court of Appeals for the Fifth Circuit should thereupon be reversed.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4347
Summary Calendar

KENT ANDREW FOLLETTE AND JANE ELIZABETH FOLLETTE,
Individually and as Next Friends of
Andrew Stephenson Follette, a Minor Child,
Plaintiffs-Appellants,

V.

CLAIROL INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

No. (92 CV 0754)

Before HIGGINBOTHAM, SMITH, and DEMOSS, Circuit Judges.

PER CURIAM:

The plaintiff parents sued Clairol, Inc. ("Clairol"), and Walmart Stores, Inc. ("Walmart"), in the United States District Court for the Eastern District of Texas, on the basis of diversity jurisdiction, for injuries allegedly sustained by their child from the explosion in Louisiana of a jug of hair

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*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

spray. The defendants moved to dismiss for want of personal jurisdiction. The district court, finding an inconvenient forum, transferred the matter to the United States District Court for the Western District of Louisiana pursuant to 28 U.S.C. S 1404(a).

In light of the intervening decision in *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993), the district court held that the Texas court never had acquired personal jurisdiction over the defendants and that, accordingly, the Louisiana federal court was free to apply Louisiana's one-year prescriptive period. The court thus granted defendants' motion for summary judgment on the grounds of prescription.

The district court based its judgment upon the reasons given by the magistrate judge in his comprehensive, sixteen-page Report and Recommendation entered February 2, 1993. We find the magistrate judge's analysis persuasive, and we AFFIRM essentially for the reasons set forth in that report.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

KENT ANDREW FOLLETTE AND JANE ELIZABETH FOLLETTE, INDIVIDUALLY AND AS NEXT FRIEND OF ANDREW STEPHENSON FOLLETTE, A MINOR CHILD	CIVIL ACTION NO. 92-0754-M
VS.	JUDGE TRIMBLE
CLAIROL, INC. AND WAL-MART STORES, INC. d/b/a SAM'S WHOLESALE CLUB, A DIVISION OF WAL-MART STORES, INC.	MAGISTRATE JUDGE WILSON

REPORT AND RECOMMENDATION

Presently before the court are motions for summary judgment filed by Clairol, Inc. (Clairol) and Wal-Mart Stores, Inc. d/b/a Sam's Wholesale Club (Wal-Mart). They have been referred to the undersigned Magistrate Judge for a report and recommendation in accordance with 28 U.S.C. § 636 (b) (1) (B).

This is a products liability action arising out of an accident occurring on August 21, 1989 in Louisiana. The product was purchased in Louisiana. It was not manufactured in Texas. The plaintiffs are residents of Louisiana. The claim has absolutely no relationship or connection with the State of Texas except for the fact that, on August 12, 1991, plaintiffs filed suit in the United States District Court for the Eastern District of Texas.

The obvious purpose for filing the suit in Texas was to

secure the benefit of Texas' two year prescriptive period. Had plaintiffs filed this suit in Louisiana their claims against both Clairol and Wal-Mart would have been prescribed. However, under Texas' choice of law rules, the Texas court would be required to apply Texas' two year statute of limitations. Texas Civil Practice and Remedies Code §71.031; *Culpepper v. Daniel Industries, Inc.*, 500 S.W. 2nd 958, 958-959, (Tex. Civ. App. Houston [1st Dist.] 1973); *writ. refused NRE* (Jan. 23, 1974).

Both Wal-Mart and Clairol filed motions to dismiss or, in the alternative, transfer the case, contending that the Texas court had neither *in personam* jurisdiction over the defendants nor any interest in the claims. The United States District Judge for the Eastern District of Texas denied the motions to dismiss or transfer for lack of personal jurisdiction. The denial was based upon the court's conclusion that both Wal-Mart and Clairol had consented to be subject to the general personal jurisdiction of the Texas courts by applying for and being issued a certificate of authority to do business. The court, nevertheless, transferred the case to the Western District of Louisiana pursuant to 28 U.S.C. § 1404(a) "in the interest of justice" and "for the convenience of parties and witnesses." (*See* 4/23/92 Order of Judge Sam B. Hall, Jr.)

Both Clairol and Wal-Mart now contend that the claims against them have prescribed. The prescription issue turns on whether Louisiana's one year statute of limitations (LSA-C.C art. 3942) or Texas' two year statue of limitations (Art. 5526 Vernons Ann. Civil Statutes) applies. The question of which prescriptive period applies, in turn, depends upon whether a Texas court could constitutionally exercise *in personam* jurisdiction over each of the defendants.

If Texas could constitutionally exercise *in personam* jurisdiction over the defendants this court is required to apply the Texas statue of limitations. *See Ferens v. John Deere Co.*, 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990). On the other hand, if the defendants were not subject to the *in personam* jurisdiction of the Texas court then the Louisi-

ana statue of limitations applies. *McTyre v. Broward General Medical Center,* 749 F. Supp. 102 (D.N.J. 1990). Thus, we reach the issue of *in personam* jurisdiction in an effort to decide whether the plaintiffs' claims have prescribed.

Plaintiffs contend that the jurisdictional issue has been decided and is now the law of this case. *See Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, S.Ct. 2166, 2177-78, 100 L.Ed.2d 811 (1988). Defendants argue that previous findings relative to jurisdiction were mere dicta that this court is free to disregard. The previous ruling on personal jurisdiction cannot be merely dismissed as dicta. The Judge denied the motions to dismiss or transfer for lack of jurisdiction. His ruling leaves no room to doubt that the reason for doing so was his conclusion that the Texas courts could exert general *in personam* jurisdiction over the defendants. Nevertheless, this court concludes that it is appropriate for it to re-examine the jurisdictional issue.

Generally, "when a court decides upon a rule of law that decision should continue to govern the same issues in subsequent stages of the same case." *Christianson, supra* at 2177. This principle applies equally to the court's own decisions and to the decisions of a coordinate court. *Id.* It is especially applicable to a transfer decision because of the threat of sending the "litigants into a vicious cycle of litigation." *Id.* at 2178.[1] However, a court has the power to revisit prior decisions although it "should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Id. (quoting Arizona v. California,* 103 S.Ct. 1382, 1391 (1981)).

The Judge's finding that the Texas court has personal jurisdiction over the defendants was based solely upon his conclusion that the defendants were deemed to have consented to be subject to the general personal jurisdiction of

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[1]Contrary to the plaintiffs' contention, it is not the transfer decision that this court is being ask to reconsider. Regardless of this court's holding the case is not going to be retransferred back to Texas.

the Texas courts by virtue of their having complied with the requirements of the State of Texas for obtaining authority to do business in that state. Subsequent to the ruling, the United States Fifth Circuit Court of Appeal handed down its decision in *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992). The court specifically held that qualifying to do business in Texas was insufficient to subject the defendant to the general *in personam* jurisdiction of the Texas courts. "[A] foreign corporation that properly complies with the Texas Registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible." *Id.* at 183.

Siemer directly conflicts with the basis for the prior decision in this case regarding the issue of personal jurisdiction. This is the type of extraordinary circumstance that justifies revisiting the issue of personal jurisdiction.

The plaintiffs argue that Texas state law controls the issue of jurisdiction before the court. They cite decisions supporting their claim that Texas courts have held that a corporation, by qualifying to do business in Texas and appointing an agent for service of process in Texas, consents to being subject to the jurisdiction of the Texas courts for all claims regardless of the relationship between the forum and the litigation. *See Goodman v. Pre-Fab Transit Co.*, 520 S.W.2d 597, 598 (Tex. Civ. App. - Houston [14th Dist.] 1975): *Acacia Pipeline Corp. v. Champlin Exploration, Inc.*, 769 S.W.2d 719 (Tex. Civ. App. - Houston [1st Dist.] 1989); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981). This position has no merit. State law controls only if the exercise of personal jurisdiction is consistent with the limits imposed by the Due Process Clause of the Fourteenth Amendment. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413 96 L.Ed. 485 (1952); *Smith v. DeWalt Products Corp.*, 743 F.2d 277, 278 (5th Cir. 1984) The decision in *Siemer* was clearly based upon the

limits imposed by the due process clause.[2]

The due process clause of the Fourteenth Amendment places limits on the State's exercise of its judicial power over foreign corporations. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). It requires, as a predicate to the exercise of personal jurisdiction, that the foreign corporation have contacts with the foreign state that "make it reasonable in the context of our federal system of government to require the corporation to defend the particular suit which is brought there." *Id.* The result is a test that is neither mechanical nor qualitative. *Id.* at 159. "[T]he relationship among the defendant, the forum, and the litigation . . . [is] the central concern of the inquiry into personal jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1970).

When, as here, the litigation has no relationship whatsoever to the corporation's purposeful contacts with the forum state the focus narrows to the relationship between the defendant and the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. at 1872. Personal jurisdiction under these circumstances has been categorized and labeled as general personal jurisdiction.[3]

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[2]The interpretation plaintiffs suggest raises both due process and commerce clause concerns. *See Lewis, Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated,* 15 Del. J. Corp. L.1 (1990); *Kidd, Inferring Express Consent: The Paradox of Permitting Registration Statues to Confer General Jurisdiction,* 9 Rev. Litig. 1 (1990).

[3]"It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." (citation omitted) *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868, 1872 n.8.

"When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." (citations omitted) *Id.* at n.9.

Id.; Siemer v. Learjet Acquisition Corp., supra; Bearry v. Beech Aircraft Corp., 818 F.2d 370 (5th Cir. 1987).

The U.S. Supreme Court has provided little specific guidance as to the precise limits on the exercise of general personal jurisdiction. In the more than 40 years since its decision in *International Shoe Co. v. Washington*, the Court has decided only two cases specifically addressing general personal jurisdiction.

Perkins v. Benquet Consolidated Mining Co., supra at 413 is the only case since *International Shoe* where the Supreme Court found that general personal jurisdiction was permissibly exercised by a state court. The defendant's mining operations in the Philippine Islands were completely stopped during the Japanese occupation. The president-general manager-principal stockholder of the defendant corporation returned to his home in Ohio. While in Ohio he carried on "continuous and systematic supervision of the necessarily limited war time activities of the company." *Perkins*, 72 S.Ct. at 419. The corporation's records were kept in Ohio. The directors' meetings were held in Ohio. Corporate bank accounts were located in Ohio and all key business decisions were made there. In short, Ohio was the "principal, if temporary, place of business" for the corporation. *quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984)). Noting that the "essence of the issue" was of "general fairness to the corporation" the Court focused its inquiry on whether the nature and amount of the defendant's activities in Ohio made it "reasonable and just to subject the corporation to the jurisdiction" of the Ohio courts. *Perkins*, 72 S.Ct. at 418. After defining the issue in these terms the Court simply concluded that, under these circumstances, an exercise of general personal jurisdiction was not prohibited by the due process clause.

The Court considered the issue of general personal jurisdiction for the second and last time in *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra*. The question before the Court was whether a foreign corporation could be

sued in a Texas court on claims arising out of a helicopter crash in Peru. The parties made no argument that the claim had any relationship to the defendants' contact with the State of Texas. 104 S.Ct. at 1872 at n.10. The Court examined the defendant's contacts with the State of Texas in order to determine whether they constituted "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*" and then held that they did not. 104 S.Ct. at 1872-73. The Court summarized the defendant's contacts with the State of Texas as follows:

> "It is undisputed that Helicol does not have a place of business in Texas and has never been licensed to do business in the state. Basically, Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account drawn on a Houston bank; purchasing helicopters, equipment and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training. 104 S.Ct. at 1873.

These two decisions do little more than establish that an exercise of general personal jurisdiction is permissible in a corporation's principal place of business and is not permissible when the corporation's contacts with the forum state are no greater than those found in *Helicopteros Nacionales de Colombia, S.A. v. Hall*. The facts of the present case place it in the broad gray area that lays in between.

The analysis under the due process clause has been further refined into two steps. *Dalton v. R&W Marine, Inc.*, 897 F.2d 1359 (5th Circ. 1990); *Bearry v. Beech Aircraft Corp., supra*. The first step involves an inquiry into whether there are "certain minimum contacts" with the forum state. *Id.* Compared to specific personal jurisdiction, contacts more extensive in nature and quality are required for general personal jurisdiction. *Helicopteros Nacionales*

de Columbia, S.A. v. Hall, supra; Dalton v. R&W Marine, Inc. supra; Bearry v. Beech Aircraft Corp., supra. Where, as here, the cause of action does not arise out of defendant corporation's purposeful contacts with the forum state there must be "continuous and systematic contacts" between the state and the foreign corporation to clear this first hurdle. *Id.*

If the plaintiff establishes the required minimum contacts the court's focus shifts to whether the exercise of general personal jurisdiction is fair and reasonable under the circumstances. *ASAHI Metal Ind. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Dalton v. R&W Marine, Inc., supra; Bearry v. Beech Aircraft Corp., supra*. This inquiry requires that the court consider: (1) the burden on the defendant, (2) the interests of the forum state, (3) the plaintiffs' interest in obtaining relief, (4) the judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interests of the several states in furthering fundamental substantive social policies. *ASAHI Metal Ind. v. Superior Court, supra* at 1033; *Dalton v. R&W Marine, Inc., supra* at 1363.

Both Clairol and Wal-Mart have substantial and continuous contacts with Texas. They are both authorized to do business in Texas. As required by law, they have appointed agents for service of process in Texas. Wal-Mart's additional contacts with Texas include;

1. Operation of approximately 264 large scale retail outlets in Texas;
2. Deriving substantial income from the sale of goods in Texas;
3. Ownership of real and personal property located in Texas;
4. Ownership of a Texas corporation;
5. Employment of a substantial number of Texas residents.

(*See* Plaintiffs' Response and Brief in Opposition to Defendant Wal-Mart's Motion to Dismiss or Transfer)

Clairol's contacts with Texas include:

1. Location of a business office in Texas;
2. The location of division regional offices in Texas;
3. Ownership of personal property located in Texas;
4. Payment of Texas property taxes;
5. Deriving substantial revenue from the sale and marketing of its products in Texas;
6. Payment of Texas franchise taxes.

(*See* Plaintiffs' Memorandum in Rebuttal to Clairol's Reply Brief p. 3, record item #25)

The court finds that plaintiffs have established that there is at least a genuine issue as to whether defendants have the necessary minimum contacts with the State of Texas. *See Rittenhouse v. Mabry*, 832 F.2d 1380, 1390 (5th Cir. 1987). This requires the court to address the issue of whether the exercise of general jurisdiction is fair and reasonable under the circumstances of this case.

There are persuasive arguments that the states with power to exercise general personal jurisdiction over a corporation should be limited to the state of incorporation and the state where the corporation's principal place of business is located. *See Twitchell, The Myth of General Jurisdiction*, 101 Harv.L.Rev. 610 (1988), (hereafter referred to as *"Twitchell, The Myth"*); *von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv.L.Rev. 1121 (1966).[4] This court agrees that this is the "fair" and "reasonable" place to draw the line on permissible exercise of general personal jurisdiction under the circumstances presented in *this case*.

Such a limit strikes the proper balance between the interests of the defendants and the interests of the plaintiffs and the states. It "raises few of the risks associated with broader

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[4]There have been a number of other suggestions as to different criteria for determining when general personal jurisdiction is permissible. *See* for example *George, In Search of General Jurisdiction*, 64 Tul.L.Rev. 1097 (1990); *Brilmayer, et al, A General Look at General Jurisdiction*, 66 Tex.L.Rev. 721 (1988).

general jurisdiction, yet insures plaintiffs of a place to sue, provides predictability for defendants, and comports with international jurisdiction standards. This approach also increases the possibility that the plaintiff will find a forum where it can sue multiple defendants . . . The exercise of dispute blind jurisdiction at the defendant's home-base comports with the historical meaning of general jurisdiction . . ." *Twitchell, The Myth*, at fn.269.

Where defendant is called upon to defend the litigation in a forum having no relationship to the controversy there is a real burden on the defendant. *Bearry v. Beech Aircraft Corp., supra* at 377. This fact was recognized by the U.S. District Court for the Eastern District of Texas in the present case when it ordered this case transferred to the Western District of Louisiana.[5] The fact that the litigation has no relationship to the forum state means that the defendant will be called upon to defend itself where no witnesses may be compelled to testify except by deposition taken outside the forum. The defendant will likely have to bear the travel expenses of those witnesses who can be convinced to voluntarily appear at the trial. Further, the forum state's court will have to adjudicate the defendant's rights by applying and interrupting the laws of another state. It is clear that the courts of the state whose substantive law will apply are best suited for this task.

The forum state's interest is tenuous at best. The plaintiff is not a resident. None of the significant events occurred there. The forum state's lack of interest is reflected in the fact that if it heard the case it could not apply its own substantive law to the extent that it materially conflicted

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[5]While the transfer pursuant to 28 U.S.C. 1404 reduces the burden to a great extent it does so by requiring the case be tried in Louisiana. It is difficult to understand how this can lend much weight to the position that it is fair and reasonable for Texas courts to exercise personal jurisdiction in this case. *(but see Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105, 2125 at n.13, 109 L.Ed.2d 631 (1990) (Brennan, J., concurring opinion)).

with Louisiana law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981). The forum state may have some general interest in the defendant's affairs because it is, to some extent, a participant in the state's economy and, possible, the state's political process. But this interest is so slight and so inferior to the interests of other states that it lends little support to an argument that the exercise of general personal jurisdiction is fair and reasonable.

Plaintiffs' interest in obtaining fair and effective relief is served by the availability of forums in states with specific personal jurisdiction (especially Louisiana) and in the state or states where the corporations are incorporated and where their principal place of business is located.

The consideration of the judicial system's interest in obtaining effective resolution of controversies would weigh in favor of limiting general personal jurisdiction as suggested. Significantly, this is not a case where exertion of personal jurisdiction by a Texas court is necessary to allow plaintiff to conveniently join all parties in one suit.

Further, in this case, this court is unable to discern any fundamental social policy that would be significantly furthered by allowing Texas, a state with no interest in the controversy, to adjudicate it. These considerations have led this court to conclude that Texas could not, consistent with the due process clause of the Fourteenth Amendment, exercise general personal jurisdiction over the defendants in this case.

Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir. 1982) reached a different result on substantially identical facts. However, for the reasons that follow, it does not control the decision in this case. Most importantly, *Cowan* was decided prior to *Helicopteros Nacionales de Columbia, S.A. v. Hall, supra*. Therefore, it failed to recognize the distinction between specific personal jurisdiction and general personal jurisdiction. More specifically the court in *Cowan* failed to recognize that general personal jurisdiction requires "the

kind of continuous and systematic general business contacts the court found to exist in *Perkins*." 104 S.Ct. at 1873. As previously noted, the exercise of general personal jurisdiction requires contacts that are more extensive in nature and quality than those required for the exercise of specific personal jurisdiction. The court in *Cowan* concluded that "sufficient contacts indisputably are present" by relying on cases involving the exercise of specific personal jurisdiction. 694 F.2d at 107 n.8. This, together with subsequent Supreme Court cases refining the analysis of the limits on the exercise of personal jurisdiction, leads this court to conclude that the decision in *Cowan* does not control the issue of personal jurisdiction before the court.[6]

This court concludes that the Texas courts could not con-

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[6]Frankly, *Cowan* cannot be easily reconciled with the decision in *Siemer v. Learjet Acquisition Corp., supra.* In *Cowan* the court distinguished *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966) and other cases stating:

> "In *Birdsong* and its progeny, the question is whether it is fair and reasonable to compel the defendant to come into the forum to defend the suit. Here, Ford has already come into Mississippi and voluntarily subjected itself to Mississippi process. It is agreed to be treated as a resident corporation. By appointing a resident agent and conducting substantial business in Mississippi, it has consented to Mississippi's exercise of personal jurisdiction." 694 F.2d at 107.

Thus, the court appeared to rely heavily on the fact that Ford had registered to do business in Mississippi and had appointed an agent for service of process in Mississippi. In *Siemer* the court held that the registration to do business in the State of Texas and the appointment of an agent for service of process was "of no special weight in evaluating general personal jurisdiction." 966 F.2d at 181. The exact criteria the court in *Cowan* used to find jurisdiction is unclear. It could be reasonably argued that the court based its finding on the defendant's consent to the forum's jurisdiction by virtue of having registered to do business and appointing an agent for service of process. It could also be reasonably argued that the decision was based upon a "minimum contacts" analysis. Since it is not clear that the decision in *Cowan* is in direct conflict with the decision in *Siemer* this court is bound to follow the latter decision.

stitutionally exercise personal jurisdiction over the defendants in this matter when the suit was filed. Therefore, *Ferens v. John Deere Co., supra* does not apply. Louisiana's one year statute of limitations is applicable. The plaintiffs' claims have prescribed.

Accordingly, IT IS RECOMMENDED that the defendants' Motions for Summary Judgment on the basis of prescription be GRANTED and that plaintiffs' claims against defendants be DISMISSED WITH PREJUDICE.

Under the provisions of 28 U.S.C. 636(b)(1)(C) the parties have ten (10) business days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE WILL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDS ON APPEAL.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 29th day of January, 1993.

/s/ Alonzo P. Wilson
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

COPY SENT
Date 1-29-93
By ln
To: Rasmussen
Perry
Curry
Brandt
Finn
Merritt
Grajczyk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4347

KENT ANDREW FOLLETTE,
Individually and as next friend, etc.,
and
JANE ELIZABETH FOLLETTE,
Individually and as next friend, etc.,
Plaintiffs-Appellants,

v.

CLAIROL INC., ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

ON PETITION FOR REHEARING
(AUGUST 10, 1993)

BEFORE Higginbotham, Smith and Demoss, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ JSR
United States Circuit Judge

REHG-4

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4347
Summary Calendar

D.C. Docket No. 92-CV-0754

KENT ANDREW FOLLETTE AND JANE ELIZABETH FOLLETTE,
Individually and as Next Friends of
Andrew Stephenson Follette, a Minor Child,
Plaintiffs-Appellants,

v.

CLAIROL INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

Before HIGGINBOTHAM, SMITH, and DEMOSS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

July 16, 1993

ISSUED AS MANDATE: Aug. 20, 1993

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

KENT ANDREW FOLLETTE AND JANE ELIZABETH FOLLETTE, INDIVIDUALLY AND AS NEXT FRIEND OF ANDREW STEPHENSON FOLLETTE, A MINOR CHILD	CIVIL ACTION NO. 92-0754-M
VS.	JUDGE TRIMBLE
CLAIROL, INC. AND WAL-MART STORES, INC. d/b/a SAM'S WHOLESALE CLUB, A DIVISION OF WAL-MART STORES, INC.	MAGISTRATE JUDGE WILSON

JUDGEMENT

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein and after an independent review of the record including the objections filed therein, and a *de novo* determination of the issues, and having determined that the findings are correct under the applicable law; it is

ORDERED that the Motions for Summary Judgment of Clairol, Inc. and Wal-Mart Stores, Inc. d/b/a Sam's Wholesale Club be and they are hereby GRANTED dismissing plaintiffs' claims against defendants with prejudice.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, the 15th day of March, 1993.

Judgment Entered 3-17-93
By /s/ Celia Ann Gallaghs
Copy To Grajczyk
Merritt
Finn
Brandt
Curry

/s/ James T. Trimble, Jr.
James T. Trimble, Jr.
United States
District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

KENT ANDREW FOLLETTE AND JANE ELIZABETH FOLLETTE, INDIVIDUALLY AND AS NEXT FRIEND AND COTUDORS OF ANDREW STEPHENSON FOLLETTE, A MINOR CHILD	*	
V.	*	No. 2:91-CV-0109
CLAIROL, INC., AND WAL-MART STORES, INC. D/B/A SAM'S WHOLESALE CLUB A DIVISION OF WAL-MART STORES, INC.	*	

ORDER

CAME ON TO BE HEARD THIS DAY Defendant Clairol, Inc.'s, Motion for Dismissal or, in the alternative, Motion to Transfer for Lack of Personal Jurisdiction in the above entitled and numbered cause of action. The Court, after considering the motion and all responses thereto, finds that the motion is not well taken.

This is a product liability cause of action. Jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332(a). The plaintiffs' allege that Andrew Stephenson Follette, an eleven year old child at the time of the incident, received severe and disfiguring burns over 80% of his body when an allegedly defective one gallon storage container of Clairol "Final Net" liquid spray exploded in the Follettes' home. The accident occurred in the State of Louisiana. (Clairol's

Motion to Dismiss at page 3). Andrew Stephenson Follette and his parents live in Louisiana. **Id.** The product, which allegedly caused the injuries, was sold and distributed in Louisiana by Sam's Wholesale Club a division of Walmart Stores, Inc. **Id.** The plaintiffs filed their lawsuit in the Eastern District of Texas Marshall Division against Clairol, Inc., and Walmart Stores, Inc., d/b/a Sam's Wholesale Club, a division of Walmart Stores, Inc. (Plaintiffs' Original Complaint). Both Clairol, Inc., and Walmart Stores, Inc., are qualified to do business in Texas. (Declaration in Support of Plaintiffs' Response to Clairol's Motion to Dismiss).

The question before this Court is whether Clairol, Inc., is subject to personal jurisdiction in the State of Texas. This Court finds that Clairol, Inc., has consented to the general jurisdiction of the Texas Courts, both state and federal, by virtue of its voluntary application for a certificate of authority to conduct business in the state.

On April 9, 1959, Clairol, Inc., was issued a certificate of authority to do business in Texas by the Secretary of State. (Declaration in Support of Plaintiffs' Response to Clairol, Inc.'s, Motion to Dismiss). Article 8.02 Powers of Foreign Corporation, of the Texas Business Corporation Act states in pertinent part:

> "A. A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked in accordance with the provisions of this Act or until a certificate of withdrawal shall have been issued by the Secretary of State as provided in this Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, as to all matters affecting the transaction of intrastate business in this State, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like character and its officers and directors;"

Tex. Bus. Corp. Act Art. 8.02 (Vernon Supp. 1991).

Once a foreign corporation applies for and receives a certificate of authority to transact business in the State of Texas, it is entitled to a vast array of powers and privileges. Specifically, Article 2.02, *General Powers*, of the Texas Business Corporation Act states in part:

> "A. Subject to the provisions of Sections B and C of this Article, each corporation shall have power:
>
> ...
>
> (2) To sue and be sued, complain and defend, in its corporate name."

Tex. Bus. Corp. Act Art. 2.02 (Vernon Supp. 1991).

Furthermore, Article 8.10, *Service of Process on Foreign Corporation*, under the Act states as follows:

> "A. The president and all vice presidents of a foreign corporation authorized to transact business in this State and the registered agent so appointed by a foreign corporation shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served."

Tex. Bus. Corp. Act Art. 8.10 (Vernon Supp. 1991). The Texas State Courts and the Courts of the Fifth Circuit have consistently held that by virtue of the theory of consent to jurisdiction implicit in the Texas Business Corporation Act under Article 8.10, a foreign corporation consents to amenability to jurisdiction for the purposes of all lawsuits brought within the state, whether or not the cause of action relates to activities with the state. *Goldman v. Prefab Transit Co.*, 520 S. W. 2d 597, 598 (Tex.Civ.App. - Houston [14th Dist.] 1975, no writ). *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981).

The rationale behind the theory of consent is that in return for the privilege of doing business in the state, and enjoying the same rights and privileges as a domestic corporation, the foreign corporation has consented to amenability to jurisdiction for the purposes of all lawsuits within the state. *Goldman*, 520 S.W.2d at 598. Since Clairol, Inc., applied for and was issued a certificate of authority to conduct business in the State of Texas, and that authority has never been withdrawn or revoked, this court finds that Clairol,

Inc., has consented to the general jurisdiction of the Texas Courts, both state and federal.

However, since the plaintiffs live in Louisiana, the product was sold in Louisiana, the accident occurred in Louisiana, and all witnesses and evidence are located in that state, this Court will transfer the action for the convenience of the parties and witnesses, in the interest of justice, to the Lincoln Parish, Western District of Louisiana, Shreveport Division, under Title 28 U.S.C. § 1404(a).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant Clairol, Inc.'s, Motion to Dismiss for Lack of Personal Jurisdiction is hereby in all things DENIED.

IT IS FURTHER ORDERED that the Defendant Clairol, Inc.'s, Motion to Transfer for Lack of Personal Jurisdiction based on Title 28 U.S.C. 1406, *Cure or Waiver of Defects*, is hereby in all things DENIED.

IT IS FURTHER ORDERED that for the convenience of parties and witnesses, in the interest of justice, the above case SHALL be TRANSFERRED to the Lincoln Parish, Western District of Louisiana, Shreveport Division, pursuant to Title 28 U.S.C. § 1404(a).

SIGNED THIS 23rd DAY OF APRIL, 1992.

/s/ Judge Sam B. Hall, Jr.
Judge Sam B. Hall, Jr., Presiding

Mid Apr. 24, 1992
Perry, Rasmussen,
Balch, Johnson,
Finn, Grajczyk

APPENDIX G

STATUTE INVOLVED
VERNON'S ANNOTATED TEXAS STATUES
BUSINESS CORPORATION ACT., ART. 2.02

Art. 2.02. General Powers

A. Subject to the provisions of Sections B and C of this Article, each corporation shall have power:

(1) To have perpetual succession by its corporation name unless a limited period of duration is stated in its articles of incorporation. Notwithstanding the articles of incorporation, the period of duration for any corporation incorporated before September 6, 1955, is perpetual if all fees and franchise taxes have been paid as provided by law.

(2) To sue and be sued, complain and defend, in its corporate name.

(3) To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed on, affixed to, or in any manner reproduced upon, instruments of any nature required to be executed by its proper officers.

(4) To purchase, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated, as the purposes of the corporation shall require.

(5) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.

(6) To lend money to, and otherwise assist, its employees, officers, and directors if such a loan or assistance reasonably may be expected to benefit, directly or indirectly, the lending or assisting corporation.

(7) To purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, mortgage, lend, pledge, sell or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals, or direct or indirect obligations of

the United States or of any other government, state, territory, government district, or municipality, or of any instrumentality thereof.

(8) To purchase or otherwise acquire its own bonds, debentures, or other evidences of its indebtedness or obligations; to purchase or otherwise acquire its own unredeemable shares and hold those acquired shares as treasury shares or cancel or otherwise dispose of those acquired shares; and to redeem or purchase shares made redeemable by the provisions of its articles of incorporation.

(9) To make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises, and income.

(10) To lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(11) To conduct its business, carry on its operations, and have offices and exercise the powers granted by this Act, within or without this State.

(12) To elect or appoint officers and agents of the corporation for such period of time as the corporation may determine, and define their duties and fix their compensation.

(13) To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this State, for the administration and regulation of the affairs of the corporation.

(14) To make donations for the public welfare or for charitable, scientific, or educational purposes.

(15) To transact any lawful business which the board of directors shall find will be in aid of government policy.

(16) To indemnify directors, officers, employees, and agents of the corporation and to purchase and maintain liability insurance for those persons.

(17) To pay pensions and establish pension plans, pension trusts, profit sharing plans, stock bonus plans, and other incentive plans for all of, or class, or classes of its officers and employees, or its officers or its employees.

(18) To be an organizer, partner, member, associate, or manager of any partnership, joint venture, or other enterprise, and to the extent permitted in any other jurisdiction to be an incorporator of any other corporation of any type or kind.

(19) To cease its corporate activities and terminate its existence by voluntary dissolution.

(20) Whether included in the foregoing or not, to have and exercise all powers necessary or appropriate to effect any or all of the purposes for which the corporation is organized.

B. Nothing in this Article grants any authority to officers or directors of a corporation for the exercise of any of the foregoing powers, inconsistent with limitations on any of the same which may be expressly set forth in this Act or in the articles of incorporation or in any other laws of this State. Authority of officers and directors to act beyond the scope of the purpose or purposes of a corporation is not granted by any provision of this Article.

C. Nothing contained in this Article shall be deemed to authorize any action in violation of the Anti-Trust Laws of this State, as now existing or hereafter amended.

APPENDIX H

STATUTE INVOLVED
VERNON'S ANNOTATED TEXAS STATUTES
BUSINESS CORPORATION
ACT, ART. 8.02

Art. 8.02. Powers of Foreign Corporation

A. A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked in accordance with the provisions of this Act or until a certificate of withdrawal shall have been issued by the Secretary of State as provided in this Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, as to all matters affecting the transaction of intrastate business in this State, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like character and its officers and directors; provided, however, that only the laws of the jurisdiction of incorporation of a foreign corporation shall govern (1) the internal affairs of the foreign corporation, including but not limited to the rights, powers, and duties of its board of directors and shareholders and matters relating to its shares, and (2) the liability, if any, of shareholders of the foreign corporation for the debts, liabilities, and obligations of the foreign corporation for which they are not otherwise liable by statute or agreement.

APPENDIX I

STATUTE INVOLVED
VERNON'S ANNOTATED TEXAS STATUTES,
BUSINESS CORPORATION ACT,
ART. 8.10

Art. 8.10. Service of Process on Foreign Corporation

A. The president and all vice presidents of a foreign corporation authorized to transact business in this State and the registered agent so appointed by a foreign corporation shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

B. Whenever a foreign corporation authorized to transact business in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be revoked, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with the Assistant Secretary of State, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice, or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of such copies thereof to be forwarded by registered mail, addressed to the corporation at its principal office in the state or country under the laws of which it is incorporated. Any service so had on the Secretary of State shall be returnable in not less than thirty days.

C. The Secretary of State shall keep a record of all processes, notices and demands served upon him under this Article, and shall record therein the time of such service and his action with reference thereto.

D. Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law.

Acts 1955, 54th Leg. p. 239, ch. 64. Amended by Acts 1973, 63rd Leg. p. 124, ch. 63, § 1, eff. April 26, 1973.

Supreme Court, U.S.
FILED
FEB 3 1994
OFFICE OF THE CLERK

No. 93-737

In the

Supreme Court of the United States

October Term, 1993

KENT ANDREW FOLLETTE and
JANE ELIZABETH FOLLETTE,
Individually and as Next Friends of
ANDREW STEPHENSON FOLLETTE, a Minor Child,

Petitioners,

v.

CLAIROL, INC. and WAL-MART STORES, INC.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

In a lawsuit filed in a Texas district court, but based on transactions and occurrences totally unrelated to that forum, the Fifth Circuit affirmed the application of the Louisiana prescriptive statute as a bar to Petitioners' personal injury claims based on a finding that it was not fair and reasonable for a Texas court to assume personal jurisdiction over the corporate defendants under the facts and circumstances of this particular case. In so holding, the Fifth Circuit rejected Petitioners' argument that compliance with the Texas registration statute represented consent to jurisdiction in all cases and a waiver of any due process challenge in a particular case.

Does the Fifth Circuit's interpretation of the scope of the Texas registration statute create an intercircuit conflict or provide any other reason for a grant of certiorari?

List of Parties, Parent Companies, and Subsidiaries

The names of all parties appear in the case caption. The parent company of Respondent Clairol, Inc. is Bristol-Myers Squibb Company. Clairol, Inc. has no subsidiaries, other than wholly owned subsidiaries. Respondent Wal-Mart Stores, Inc. has no parent company. The subsidiaries of Wal-Mart Stores, Inc. (other than wholly owned subsidiaries) are as follows:

Club Aurrera S.A. de C.V.
Commercializadora Mexico Americana S.A. de C.V.
Controladora Club Aurrera S.A. de C.V.
Immobiaiaria Capir S.A. de C.V.
Quality Leasing Corp.
Temple Beverages, Inc.
Wal-Mart Pharmacy of Michigan, Inc.

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STATUTES AND OTHER SOURCES

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4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1066, 1067 (2d ed. 1987) 16

Statutory and Constitutional Provisions

In their list of statutory and constitutional provisions, Petitioners erroneously include article 8.08 of the Texas Business Corporation Act. In their brief on appeal to the Fifth Circuit, this statutory section was neither mentioned nor discussed.

Statement of the Case

This products liability action arose from a household accident that occurred in Louisiana involving a product purchased in Louisiana by Petitioners, who are Louisiana residents. Petitioners sued Clairol and Wal-Mart in federal court in Texas. As the court below specifically found, the cause of action "had absolutely no relationship or connection with the State of Texas" except that the plaintiffs filed suit there.[1] Petitioners concede that if they had filed suit in Louisiana, where their claims arose, the claims would have been prescribed by Louisiana's one-year prescriptive statute.[2]

Clairol is a Delaware corporation with its principal place of business in New York; Wal-Mart is a Delaware corporation with its principal place of business in Arkansas. In the Texas court, both corporations filed motions to dismiss for lack of personal jurisdiction, or in the alternative, to transfer the case under 28 U.S.C. § 1406(a).

Unlike some states, Texas has no statute providing that Texas courts have general personal jurisdiction over all corporations that have qualified to do business in Texas or have registered an agent there for service of process. Similarly, no Texas statute provides that qualification to do business or registration of an agent represents consent by the corporation to personal jurisdiction in any lawsuit.

---

[1] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 3a.

[2] Petition for a Writ of Certiorari, at 7. The record below contains no support for Petitioners' explanation to this Court of why they delayed in filing suit until after Louisiana's prescriptive statute had run. *See id.*

The federal district judge in Texas nevertheless decided that merely by qualifying to do business in Texas, Clairol and Wal-Mart had "consented" to general personal jurisdiction in all Texas courts in all lawsuits.[3] On that basis alone, the Texas court concluded that it had general personal jurisdiction over the two corporations. Despite that conclusion, the Texas judge transferred the case to a Louisiana federal court under 28 U.S.C. § 1404(a).

Soon after the transfer, the Fifth Circuit handed down its decision in *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1047, 122 L. Ed. 2d 356 (1993). In *Siemer*, the Fifth Circuit held that the mere act of qualifying to do business in Texas does not automatically subject a defendant to the general personal jurisdiction of all Texas courts in all lawsuits. Instead, "a foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible."[4]

The *Siemer* court explained that the mere appointment of an agent for service of process does not automatically confer general personal jurisdiction over the corporation in all lawsuits, even those with no relationship to the forum. The appointment of an agent, said the court, does not amount to a waiver of a corporation's due process protection. Instead, a federal court must still conduct the traditional due process analysis required by *Perkins v. Benguet Consolidated Mining Co.*[5] – including the two-part assessment of minimum contacts and fairness.

In the Louisiana federal court, Clairol and Wal-Mart filed motions for summary judgment based on the application of

---

[3] Order of the U.S. District Court for the Eastern District of Texas, Appendix F to the Petition for a Writ of Certiorari, at 20a-23a. The order in Appendix F concerns only Clairol's motion to dismiss. The Texas district court issued a similar order concerning Wal-Mart's motion to dismiss, which is included as Appendix A to this brief.

[4] *Siemer*, 966 F.2d at 183.

[5] 342 U.S. 437, 445-48 (1952).

Louisiana's one-year prescriptive statute. Directly applying the holding of *Siemer*, the Louisiana district court determined that the Texas district court had erroneously found general personal jurisdiction based solely on the corporations' compliance with the Texas registration statute.[6] The Louisiana federal court then conducted the traditional due process analysis required by the Fifth Circuit in *Siemer* and explained by this Court in *Asahi Metal Industry Co. v. Superior Court*[7] and *Perkins*,[8] among other cases.[9] The Louisiana court concluded that even if there were sufficient minimum contacts, the exercise of personal jurisdiction by the Texas court was not fair and reasonable under the facts and circumstances of this case.[10]

Contrary to Petitioners' characterization of the court's holding, the Louisiana federal court did not expansively hold that the Due Process Clause would be violated if a state ever exercised personal jurisdiction over a foreign corporation for a claim unrelated to the corporation's activities in the state.[11] Similarly, the court did not "draw the line," for all states and all cases, that general personal jurisdiction is limited to the state of incorporation and the state where the principal place of business is located.[12] Instead, the Louisiana federal court

---

[6] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 5a-7a. The Louisiana district court specifically adopted the reasoning of the Report and Recommendation. *See* Judgment of the U.S. District Court for the Western District of Louisiana, Appendix E to the Petition for a Writ of Certiorari, at 18a-19a. The district court's opinion, which includes the Report and Recommendation, is now published: *Follette v. Clairol, Inc.*, 829 F. Supp. 840 (W.D. La.), *aff'd*, 998 F.2d 1014 (5th Cir. 1993) (table entry).

[7] 480 U.S. 102 (1987).

[8] 342 U.S. 437 (1952).

[9] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 7a-15a.

[10] *Id.* at 14a-15a.

[11] *See* Petition for a Writ of Certiorari, at 9-10.

[12] *Id.* at 10.

issued a very narrow holding, based solely on its application of the two-part due process analysis to the circumstances of this case:

> The court finds that plaintiffs have established that there is at least a genuine issue as to whether defendants have the necessary minimum contacts with the State of Texas. This requires the court to address the issue of whether the exercise of general jurisdiction is fair and reasonable under the circumstances of this case.
>
> There are persuasive arguments that the states with power to exercise general personal jurisdiction over a corporation should be limited to the state of incorporation and the state where the corporation's principal place of business is located. This court agrees that this is the "fair" and "reasonable" place to draw the line on permissible exercise of general personal jurisdiction under the circumstances presented in *this* case.[13]

The Louisiana federal court concluded that since the Texas federal court did not have personal jurisdiction over the two corporations, the Texas statute of limitations did not apply.[14] Instead, the Louisiana one-year prescriptive statute barred Petitioners' claims as a matter of law.[15] The Louisiana federal court thus granted summary judgment for the corporations.[16]

Petitioners appealed this decision to the Fifth Circuit. In their appeal, they did not contend that under the due process analysis set forth in *Perkins* and *Asahi*, the Louisiana federal

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[13] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 11a (emphasis in original) (citations omitted).

[14] *Id.* at 4a, 15a (citing *Ferens v. John Deere Co.*, 494 U.S. 516 (1990)).

[15] *Id.* at 15a.

[16] *Id.*; Judgment of the U.S. District Court for the Western District of Louisiana, Appendix E to the Petition for a Writ of Certiorari, at 18a-19a.

court had wrongly determined that it was not fair and reasonable to subject the corporations to general personal jurisdiction in Texas. Instead, Petitioners argued only that the court had erred in concluding that such an analysis was required. Despite the Fifth Circuit's recent holding to the contrary in *Siemer*, Petitioners contended in their brief that the Texas registration statute provides broad consent to personal jurisdiction in all lawsuits filed in Texas, without resort to any due process analysis.

In an unpublished opinion, the Fifth Circuit adopted the reasoning of the Report and Recommendation of Magistrate Judge Wilson, which had also served as the basis for the district court's decision.[17] Opinions that are not published by the Fifth Circuit are those that "have no precedential value and merely decide particular cases on the basis of well-settled principles of law."[18]

Reasons for Denying the Writ

In the Report and Recommendation, on which both lower courts based their decisions, the magistrate judge concluded that under *Siemer*: (1) the Texas registration statute did not provide for "automatic consent" or waiver of any due process challenge to jurisdiction by all foreign corporations; and (2) a traditional due process inquiry was necessary in each case. The magistrate judge then applied the due process analysis required by *International Shoe*, *Perkins*, and *Asahi* to the specific facts of this case.

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[17] *See Follette v. Clairol, Inc.*, No. 93-4347 (unpublished opinion of the Fifth Circuit), Appendix A to the Petition for a Writ of Certiorari, at 1a-2a (table entry at 998 F.2d 1014 (5th Cir. 1993)); Judgment of the U.S. District Court for the Western District of Louisiana, Appendix E to the Petition for a Writ of Certiorari, at 18a-19a.

[18] Local Rule of the Fifth Circuit 47.5.1 (28 U.S.C. Rules, Fifth Circuit); *see Follette v. Clairol, Inc.*, No. 93-4347 (unpublished opinion of the Fifth Circuit), Appendix A to the Petition for a Writ of Certiorari, at 1a (quoting the Local Rule).

Based on that analysis, the magistrate judge concluded that even if minimum contacts existed, the maintenance of the suit in Texas would not be fair and reasonable – that is, would offend "traditional notions of fair play and substantial justice."[19] As this Court has explained, this determination depends "on the particular facts of each case."[20] Such fact-based decisions are not appropriate for certiorari consideration in the absence of "a marked departure by a lower court in the application of established law."[21]

In this case, the initial factual determination by the magistrate judge has already been reviewed by two separate courts – the United States District Court for the Western District of Louisiana and the United States Court of Appeals for the Fifth Circuit. This factual finding is entitled to deference because this Court accords "great weight to a finding of fact which has been made by a district court and approved by a court of appeals."[22] Moreover, in the Fifth Circuit, Petitioners did not challenge this finding of fact. Instead, they argued merely that the trial court should not have conducted a due process analysis but should have instead presumed that jurisdiction in Texas was proper based solely on "consent" to jurisdiction under the Texas registration statute.

In the Fifth Circuit and in this Court, Petitioners mischaracterize the Texas registration statute as a broad contract between the state and all foreign corporations that comply with it. They argue that merely by obeying the Texas registration statute, corporations automatically consent to personal jurisdiction over them in any lawsuit, filed in any Texas court, by any plaintiff – even if the lawsuit arises outside Texas and

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[19] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[20] *General Council of the United Methodist Church v. Superior Court*, 439 U.S. 1369, 1373 (1978); *see Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

[21] *General Council of the United Methodist Church*, 439 U.S. at 1373-74.

[22] *N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 98 n.15 (1984); *see Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

has no relationship to the state.[23] In this case, the Fifth Circuit Court of Appeals unanimously rejected that statutory interpretation, noting that it directly conflicted with its recent decision in *Siemer v. Learjet Acquisition Corp.*,[24] a similar case involving the same Texas statute. This Court recently denied the petition for writ of certiorari in *Siemer*.[25]

In *Siemer*, the plaintiffs had asserted the identical "automatic consent to jurisdiction" argument as that asserted by Petitioners in this case. In *Siemer*, the Fifth Circuit rejected that argument because:

(1) It was not supported by the language of the Texas statutes on which the plaintiffs relied.

(2) It was inconsistent with the due process analysis set forth by this Court in *Hall*, which holds that before subjecting a corporation to claims arising outside the forum, the court must assess not only whether the corporation has substantial contacts with the forum, but also whether the exercise of jurisdiction is fair and reasonable under the circumstances.

(3) It ignored the five factors enunciated by this Court in *Asahi* – factors a court should consider in determining whether the exercise of jurisdiction is fair and reasonable under the circumstances of the case.

The Fifth Circuit in this case merely applied the holding of *Siemer*. As in *Siemer*, there is no reason and no need for this Court to review the Fifth Circuit's decision. The result

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[23] In their brief to the Fifth Circuit, Petitioners argued that the Texas Business Corporation Act "gives *consent* to the jurisdiction of Texas courts for any cause of action, whether or not arising out of activities within the state. Such consent is, as it always has been, a valid basis of personal jurisdiction, and resort to any type of 'minimum contacts' or 'sustained and systematic contacts' analysis to justify jurisdiction is unnecessary."

[24] 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1047, 122 L. Ed. 2d 356 (1993).

[25] *Id.*

reached in this case is consistent with the express language of a particular state statute; the trial and appellate courts below reached a fact-specific conclusion after applying the current due process standards for personal jurisdiction.[26]

I. The Texas statute on which Petitioners rely is contrary to their position.

The actual language of the Texas Business Corporation Act undercuts Petitioners' premise that foreign corporations, merely by complying with the Act's registration requirements, waive their right to due process protection and grant their consent to be sued in Texas for any and all causes of action arising anywhere in the world. Although some state statutes do contain such a broad waiver based on consent to jurisdiction, the Texas statute specifically limits the duties, restrictions, penalties, and liabilities that can be imposed on a foreign corporation:

> A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked . . . , enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, *as to all matters affecting the transaction of intrastate business in this State*, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation.[27]

The Texas statute, itself, does not purport to subject foreign corporations to the same burdens as domestic corporations as to all matters – but only "as to all matters affecting

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[26] *See General Council of the United Methodist Church*, 439 U.S. at 1373; *Kulko*, 436 U.S. at 92.

[27] Tex. Bus. Corp. Act Ann. art. 8.02 (Vernon Supp. 1994) (emphasis added).

the transaction of *intrastate business*."[28] The matter in this case does not affect or involve intrastate business in Texas; instead, it arises out of an accident in Louisiana involving Louisiana residents and a product purchased in Louisiana.

While the magistrate judge did not specifically discuss the language of the Texas registration statute, the court – based on *Siemer* – rejected Petitioners' "automatic consent to jurisdiction" or "due process waiver" argument. The *Siemer* court specifically considered, and rejected, the contention that the Texas statute grants Texas courts personal jurisdiction in any and all cases, even those arising outside the state:

> The Texas Business Corporation Act provides that service on a registered foreign corporation may be affected by serving its president, any vice president, or the registered agent of the corporation. . . .
>
> The Eighth Circuit, construing an Arkansas registration statute even less explicit as to its limited scope, found that the statute could be read, "at its broadest, to cover only causes of action arising out of . . . transactions in Arkansas." *Pearrow v. National Life & Accident Insurance Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983) (citations omitted). In the First Circuit, it was noted that any other construction of the Maine registration statute would be unreasonable. *Sandstrom v. ChemLawn Corp.*, 727 F. Supp. 676, 681 (D. Me. 1989), *aff'd*, 904 F.2d 83, 88-89 (1st Cir. 1990).[29]

Like the *Pearrow* court and the *Sandstrom* court, the *Siemer* court concluded that the statute at issue, at its broadest, covered only claims arising from intrastate transactions.

In *Pearrow*,[30] the Eighth Circuit considered an Arkansas registration statute similar to the Texas statute.[31] Like the

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[28] *Id.* (emphasis added).

[29] *Siemer*, 966 F.2d at 183.

[30] 703 F.2d 1067 (8th Cir. 1983).

[31] *Siemer*, 966 F.2d at 183.

Texas statute, the Arkansas statute subjected foreign insurers to process for any obligations or liabilities resulting from their transactions within the state.[32] The plaintiff argued that by registering an agent within the state, the corporation had consented to the general jurisdiction of the state's courts.[33]

The Eighth Circuit rejected that argument without ever reaching the constitutional question of whether consent to jurisdiction, expressly or impliedly granted in a broad registration statute, would provide an adequate constitutional basis for general personal jurisdiction. The court explained: "To the extent that [the registration statute] can be read as jurisdictional rather than as a method of serving process, it does not apply to this case. That section can be read, at its broadest, to cover only causes of action arising out of the insurance business or other transactions in Arkansas."[34]

Like the courts in *Siemer*, *Pearrow*, and *Sandstrom*, the court in this case conducted a traditional due process analysis because the specific state statute, as construed by the federal court, did not contain any express consent to jurisdiction and did not require an advance waiver of any due process challenge to jurisdiction.

II. This decision is consistent with decisions in other circuits on the effect of registration statutes in the analysis of personal jurisdiction.

Petitioners argue that the decision in this case conflicts with two decisions – *Bane v. Netlink, Inc.*,[35] from the Third Circuit, and *Knowlton v. Allied Van Lines*,[36] from the Eighth Circuit. *Bane* and *Knowlton*, however, fall into an entirely different category from the decisions in *Pearrow*, *Sandstrom*, *Siemer*, and the current case. The distinguishing factor in

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[32] *Pearrow*, 703 at 1069 & n.3.

[33] *Id.* at 1068-69.

[34] *Id.* at 1069 (citations omitted).

[35] 925 F.2d 637 (3d Cir. 1991).

[36] 900 F.2d 1196 (8th Cir. 1990).

cases such as *Bane* and *Knowlton* is that the courts construed the state statutes to contain an express consent to jurisdiction and a waiver of a due process challenge in any case.

In both *Bane* and *Knowlton*, the courts construed state statutes that were significantly broader than the Texas statute and the statutes considered in *Pearrow* and *Sandstrom*. Unlike the Texas statute, which is specifically limited to "matters affecting the transaction of intrastate business in this State,"[37] the statutes considered in *Bane* and *Knowlton* contain no such limitations. The *Bane* and *Knowlton* courts therefore considered the constitutional question of whether, under a broad state registration statute, a corporation's advance consent to jurisdiction and advance waiver of any due process challenge were constitutional.

A. *Bane* creates no conflict with this case because the *Bane* court construed a state statute that expressly requires corporate consent to general personal jurisdiction.

In *Bane v. Netlink, Inc.*, the Third Circuit case that allegedly creates a conflict, the court considered whether Mr. Bane, who had worked for Netlink both in Pennsylvania and in Massachusetts, could sue Netlink in Pennsylvania for age discrimination.[38] Netlink was a Delaware corporation with its principal place of business in North Carolina.[39] Based on a traditional due process analysis of minimum contacts and fairness, the Pennsylvania federal district court held that it lacked general personal jurisdiction over Netlink.[40] The Third Circuit disagreed, noting that the trial court had failed to

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[37] Tex. Bus. Corp. Act art. 8.02 (Vernon Supp. 1994). Petitioners incorrectly suggest that the Texas statute is not limited to intrastate activities. Petition for a Writ of Certiorari, at 11 n.8.

[38] 925 F.2d 637, 638-39 (3d Cir. 1991).

[39] *Id.* at 638.

[40] *Id.* at 639-40.

consider the effect of Netlink's qualifying to do business in Pennsylvania.[41]

Without deciding whether this additional contact would, under a traditional due process analysis, change the trial court's result on the issue of general personal jurisdiction, the Third Circuit concluded that based on a Pennsylvania jurisdictional statute, Netlink had actually consented to general personal jurisdiction.[42] This conclusion was reasonable, in light of the statute's express language on the issue of general personal jurisdiction:

> The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise *general personal jurisdiction* over such person . . . :
>
> (2) Corporations –
>
> (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.[43]

The Pennsylvania statute thus gave Netlink actual notice that a Pennsylvania court could exercise general personal jurisdiction over it based solely on the act of qualifying to do business in the state. In light of this statute, the Third Circuit concluded that Netlink had actually consented to general personal jurisdiction in any case filed within the state and had therefore waived any right to have a court consider the issue of due process.

Unlike the statute in *Bane*, the Texas statutes relied on by Petitioners give a foreign corporation no indication that general personal jurisdiction can be based merely on the act of qualifying to do business or registering an agent for service of process. In contrast to the Pennsylvania statute, the Texas

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[41] *Id.* at 640.

[42] *Id.*

[43] *Id.* (quoting 42 Pa. Cons. Stat. Ann. § 5301 (1990)) (emphasis added).

statutes do not even mention personal jurisdiction. Because of the limited nature of the Texas statutes, the courts in this case faced an entirely different question from the question considered in *Bane*.

B. *Knowlton* creates no conflict with this case because the *Knowlton* court construed an unlimited state statute as a broad grant of corporate consent to jurisdiction.

In *Knowlton v. Allied Van Lines*, Ms. Knowlton, a Minnesota resident, was driving through Iowa when an Allied moving van collided with her car.[44] Allied was a Delaware corporation with its principal place of business in Illinois.[45] Ms. Knowlton sued Allied in Minnesota.[46] The Minnesota federal district court found that it lacked jurisdiction over Allied under the Minnesota long-arm statute.[47]

The Eighth Circuit agreed that specific personal jurisdiction did not exist under the long-arm statute, because the tort did not arise from any conduct by Allied within the state.[48] But the Eighth Circuit concluded that the court had general personal jurisdiction based on the corporation's consent to jurisdiction under the broad Minnesota registration statute.[49]

The Minnesota statute required foreign corporations transacting business within the state to appoint an agent for service of process.[50] The statute also provided that a foreign corporation that complies with the statute "shall be subject to the laws of this state."[51] The *Knowlton* court recognized that a

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[44] 900 F.2d 1196, 1197 (8th Cir. 1990).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1199.

[49] *Id.*

[50] *Id.* at 1198 n.1.

[51] *Id.*

statute "can be limited to claims arising out of in-state activities, and some statutes are so limited, but the Minnesota law contains no such limitation."[52] In contrast, the Texas Business Corporation Act, despite Petitioners' statement to the contrary,[53] is specifically limited to matters arising from the transaction of intrastate business.[54]

Adhering to the statutory construction of earlier cases in Minnesota federal courts and in the Minnesota Supreme Court, the court in *Knowlton* construed the unlimited Minnesota statute as a specific grant of corporate consent to personal jurisdiction in any case filed within the state and as a waiver of any due process challenge in a particular case. The *Knowlton* court considered a significantly broader state statute than the Texas statute and reached a different result from the Fifth Circuit. Such a difference, however, does not create a direct or irreconcilable intercircuit conflict on a significant federal issue.

C. The decision in this case is consistent with the decisions of other circuits that have considered analogous statutes.

The decision in this case corresponds to decisions from other circuits, including the Eighth Circuit, that have construed limited state registration statutes to contain no consent to jurisdiction and no waiver of due process protection. *See, e.g., Pittock v. Otis Elevator Co.*, 8 F.3d 325, 328 (6th Cir. 1993) (explaining that "the mere designation of an agent in compliance with the service-of-process statute does not automatically eliminate the requirement of minimum contacts to establish personal jurisdiction"); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 88-89 (1st Cir. 1990) (finding that a company's appointment of an agent for service of process in Maine did not automatically subject the company to general

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[52] *Id.* at 1199.

[53] *See* Petition for a Writ of Certiorari, at 11 n.8.

[54] Tex. Bus. Corp. Act Ann. art. 8.02 (Vernon Supp. 1994); *see supra* note 27 and accompanying text.

personal jurisdiction for a claim arising in Connecticut; instead, the traditional two-part due process analysis must still be undertaken); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983) (holding that an Arkansas registration statute limited in its scope could be read, "at its broadest, to cover only causes of action arising out of . . . transactions in Arkansas"); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 746, 748 (4th Cir.) (holding that whether general personal jurisdiction exists depends on concepts of fairness and convenience, and not merely on procedural compliance with state domestication statutes), *cert. denied*, 404 U.S. 948 (1971).

Based on their interpretation of limited state statutes, the courts in these cases concluded that the traditional due process analysis was necessary. In each of these cases, the federal court applied that analysis to the facts and circumstances of the case. The federal magistrate and the two federal courts below conducted the same analysis in this case.

These cases are distinguishable from *Bane* and *Knowlton*, which interpreted unlimited state statutes as a broad consent by foreign corporations to personal jurisdiction. Unlike *Bane* and *Knowlton*, the present case can be disposed of based solely on the limited scope of the Texas Business Corporation Act, which specifically restricts a foreign corporation's duties and liabilities to matters affecting the transaction of intrastate business.

This case does not present the constitutional question of whether mere registration to do business, under an unlimited state statute, would provide a sufficient basis for general personal jurisdiction in all cases, without any due process analysis. Consideration of that question by this Court, if merited, should await a case in which the question is raised directly – as when a federal court has construed an unlimited state statute, like the statute in *Bane*, as an advance consent to jurisdiction and an advance waiver of any due process challenge, but has then declared the statute unconstitutional and sustained the corporation's due process challenge to personal jurisdiction.

III. This decision is consistent with this Court's analysis in recent general jurisdiction cases.

Petitioners also argue that the decision in this case conflicts with "an applicable decision of this Court."[55] But the alleged "applicable decision," *Neirbo Co. v. Bethlehem Shipbuilding Co.*,[56] dates from 1939 – before this Court decided *International Shoe Co. v. Washington* in 1945.[57] In *International Shoe*, this Court began to redefine the constitutional limitations of state court jurisdiction and personal jurisdiction.[58] The more realistic jurisdictional standards of *International Shoe* and its progeny replaced the earlier fictional theories of consent and presence, on which *Neirbo* and earlier cases were based.[59]

The Fifth Circuit's rejection of Petitioners' position is consistent with this Court's leading cases on general jurisdiction.[60] In his comprehensive sixteen-page Report and Recommendation, which was adopted by the Louisiana district court and by the Fifth Circuit, Magistrate Judge Wilson specifically discussed *Hall* and *Perkins* in detail, applying the principles of each case to the facts and circumstances of the present case.[61]

The magistrate judge recognized that under applicable case law, even if the required minimum contacts exist, a federal court must still determine whether the exercise of general personal jurisdiction is fair and reasonable under all

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[55] Petition for a Writ of Certiorari, at 15.

[56] 308 U.S. 165 (1939).

[57] 326 U.S. 310 (1945).

[58] 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1067, at 248-49 (2d ed. 1987) (discussing *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945)).

[59] *Id.* §§ 1066-1067.

[60] *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

[61] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 7a-9a.

the circumstances.[62] Based on the circumstances of this case, the magistrate judge assessed the five factors set forth in *Asahi* for determining whether the exercise of general jurisdiction is fair and reasonable.[63] The Report and Recommendation contains a detailed analysis of each of the following factors in the context of this case:

(1) the burden on the defendant;

(2) the interests of the forum state in adjudicating the dispute;

(3) the plaintiff's interest in obtaining convenient and effective relief;

(4) the judicial system's interest in obtaining the most efficient resolution of controversies; and

(5) the shared interests of the several states in furthering fundamental substantive social policies.[64]

Both the district court and the Fifth Circuit Court of Appeals specifically adopted the reasons in the Report and Recommendation. In light of the thoughtful and painstaking analysis in that report, which faithfully applies this Court's teachings in recent jurisdictional cases, the alleged conflict between this decision and a 1939 Supreme Court case provides no basis for granting a writ of certiorari.

IV. This decision does not involve federalism, state sovereignty, or the constitutionality of any Texas statute.

In the final section of their brief, Petitioners sweepingly allege that the district court and the Fifth Circuit have inappropriately considered federalism, have impinged on state sovereignty, and have struck down a Texas statute as unconstitutional. These allegations are false.

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[62] *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

[63] Report and Recommendation of Magistrate Judge Wilson, Appendix B to the Petition for a Writ of Certiorari, at 10a-13a.

[64] *Asahi*, 480 U.S. at 113; *Burger King*, 471 U.S. at 476-77.

To support their argument on federalism, Petitioners seize on one paragraph from the Report and Recommendation that compares the forum's interests in the dispute with the interests of the other states.[65] That paragraph, however, is merely a straightforward discussion of two of the specific factors set forth in *Asahi* for determining whether the exercise of jurisdiction is fair and reasonable under the circumstances: (1) the interests of the forum state in adjudicating the dispute; and (2) the shared interests of the several states in furthering fundamental substantive social policies.[66] The plain language of the Report and Recommendation reveals that the considerations criticized by Petitioners flow directly from a faithful application of the *Asahi* factors to the circumstances of this case.

Contrary to Petitioners' assertion that the Court of Appeals found the Texas Business Corporation Act unconstitutional, no court even considered the constitutionality of this statute or any other statute in this case. Such consideration was unnecessary because the statute does not purport to grant Texas courts general jurisdiction over any foreign corporation that has complied with the Texas registration statute. To the contrary, one section of the statute actually limits the duties and liabilities of such corporations to only those matters that affect intrastate business.[67]

The Court of Appeals in this case merely applied the holding of *Siemer*, which had construed the Texas statute to apply only to intrastate transactions. The federal court did not purport to dictate how the statute must be construed by the Texas Supreme Court – which has never considered the statute in the context of personal jurisdiction. The most pertinent authority on the issue from the Texas Supreme Court, *Guardian Royal Exchange Assurance, Ltd. v. English China Clays,*

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[65] Petition for a Writ of Certiorari, at 18.

[66] *Asahi*, 480 U.S. at 113; *see Burger King*, 471 U.S. at 477.

[67] Tex. Bus. Corp. Act Ann. art. 8.02 (Vernon Supp. 1994); *see supra* note 27 and accompanying text.

P.L.C.,[68] comprehensively discusses both specific and general jurisdiction over foreign corporations,[69] clarifies the standard "to ensure compliance with federal constitutional requirements of due process,"[70] but never even hints that the standard might be inapplicable if a corporation has complied with the Texas registration statute.

In *Guardian Royal*, there is no mention of whether the foreign corporation had actually registered to do business in Texas. But in a case that is otherwise similar to the present one, the Texas Supreme Court held that although the corporation had conducted substantial business in Texas and had purposefully established minimum contacts, the assertion of personal jurisdiction, under the facts and circumstances of the case, was unreasonable and did not "comport with fair play and substantial justice."[71]

Moreover, the language of the Texas Supreme Court in *Guardian Royal* suggests that it would agree with the Fifth Circuit's construction of the Texas statute. The *Guardian Royal* court explained that when a Texas court considers personal jurisdiction, "the facts must be carefully weighed and mechanical application of any test . . . must be avoided. In addition, Texas courts should strive to utilize a realistic approach when applying the jurisdictional formula."[72]

The federal courts below applied federal law to determine whether a federal court in Texas had personal jurisdiction over the two defendants in this lawsuit. In so doing, they made no sweeping pronouncements about federalism, state sovereignty, or the constitutionality of Texas law. Despite Petitioners' attempts to characterize this decision as far-

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[68] 815 S.W.2d 223 (Tex. 1991).

[69] *Id.* at 227-33.

[70] *Id.* at 230.

[71] *Id.* at 232-33 (discussing the five fairness factors and citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

[72] *Id.* at 231.

reaching, its straightforward application of federal due process standards is important only to those who are parties to this lawsuit.

CONCLUSION

The unpublished opinion of the Fifth Circuit Court of Appeals applies well-settled due process principles to the specific facts and circumstances of this case. This decision does not conflict with any decision of this Court, does not create a direct conflict with the decisions of other Circuit Courts of Appeals, and does not meet any of the other criteria for certiorari review by this Court. Accordingly, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

KENT ANDREW FOLLETTE AND JANE ELIZABETH FOLLETTE, INDIVIDUALLY AND AS NEXT FRIEND AND COTUDORS OF ANDREW STEPHENSON FOLLETTE, A MINOR CHILD	*	
V.	*	NO. 2:91-CV-0109
CLAIROL, INC., AND WAL-MART STORES, INC., D/B/A/ SAM'S WHOLESALE CLUB AND/OR SAM'S WHOLESALE CLUB A DIVISION OF WAL-MART STORES, INC.	*	

ORDER

CAME ON TO BE HEARD THIS DAY Defendant Wal-mart Stores, Inc.'s, Motion for Dismissal or, in the alternative, Motion to Transfer for Lack of Personal Jurisdiction in the above entitled and numbered cause of action. The Court, after considering the motion and all responses thereto, finds that the motion is not well taken.

This is a product liability cause of action. Jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332(a). The plaintiffs allege that Andrew Stephenson Follette, an eleven year old child at the time of the incident, received severe and disfiguring burns over 80% of his body when an allegedly defective one gallon storage container of Clairol "Final Net" liquid spray exploded in the Follettes' home. The accident

occurred in the State of Louisiana. (Clairol's Motion to Dismiss at page 3). Andrew Stephenson Follette and his parents live in Louisiana. *Id.* The product, which allegedly caused the injuries, was sold and distributed in Louisiana by Sam's Wholesale Club a division of Walmart Stores, Inc. *Id.* The plaintiffs filed their lawsuit in the Eastern District of Texas Marshall Division against Clairol, Inc., and Walmart Stores, Inc., d/b/a Sam's Wholesale Club, a division of Walmart Stores, Inc. (Plaintiffs' Original Complaint). Both Clairol, Inc., and Walmart Stores, Inc., are qualified to do business in Texas. (Declaration in Support of Plaintiffs' Response to Clairol's Motion to Dismiss).

The question before this Court is whether Walmart Stores, Inc., is subject to personal jurisdiction in the State of Texas. This Court finds that Walmart Stores, Inc., has consented to the general jurisdiction of the Texas Courts, both state and federal, by virtue of its voluntary application for a certificate of authority to conduct business in the state.

On October 29, 1974, Walmart Stores, Inc., was issued a certificate of authority to do business in Texas by the Secretary of State. (Declaration in Support of Plaintiffs' Response to Clairol, Inc.'s, Motion to Dismiss). On October 19, 1983, Walmart Stores, Inc., registered Sam's Wholesale Club as an assumed name of Walmart Stores, Inc. *Id.* Article 8.02, *Powers of Foreign Corporation,* of the Texas Business Corporation Act states in pertinent part:

> "A. A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked in accordance with the provisions of this Act or until a certificate of withdrawal shall have been issued by the Secretary of State as provided in this Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, as to all matters affecting the transaction of intrastate business in this State, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or

> hereafter imposed upon a domestic corporation of like character and its officers and directors;"

Tex. Bus. Corp. Act Art. 8.02 (Vernon Supp. 1991).

Once a foreign corporation applies for and receives a certificate of authority to transact business in the State of Texas, it is entitled to a vast array of powers and privileges. Specifically, Article 2.02, *General Powers,* of the Texas Business Corporation Act states in part:

> "A. Subject to the provisions of Sections B and C of this Article, each corporation shall have power:
>
> . . .
>
> (2) To sue and be sued, complain and defend, in its corporate name."

Tex. Bus. Corp. Act Art. 2.02 (Vernon Supp. 1991).

Furthermore, Article 8.10, *Service of Process on Foreign Corporation,* under the Act states as follows:

> "A. The president and all vice presidents of a foreign corporation authorized to transact business in this State and the registered agent so appointed by a foreign corporation shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served."

Tex. Bus. Corp. Act Art. 8.10 (Vernon Supp. 1991). The Texas State Courts and the Courts of the Fifth Circuit have consistently held that by virtue of the theory of consent to jurisdiction implicit in the Texas Business Corporation Act under Article 8.10, a foreign corporation consents to amenability to jurisdiction for the purposes of all lawsuits brought within the state, whether or not the cause of action relates to activities within the state. *Goldman v. Prefab Transit Co.,* 520 S.W.2d 597, 598 (Tex.Civ.App. – Houston [14th Dist.] 1975, no writ). *Prejean v. Sonatrach, Inc.,* 652 F.2d 1260, 1270 n.21 (5th Cir. 1981).

The rationale behind the theory of consent is that in return for the privilege of doing business in the state, and enjoying the same rights and privileges as a domestic corporation, the foreign corporation has consented to amenability to jurisdiction for the purpose of all lawsuits within the state.

Goldman, 520 S.W.2d at 598. Since Walmart Stores, Inc., applied for and was issued a certificate of authority to conduct business in the State of Texas, and that authority has never been withdrawn or revoked, this Court finds that Walmart Stores, Inc., has consented to the general jurisdiction of the Texas Courts, both state and federal.

However, since the plaintiffs live in Louisiana, the product was sold in Louisiana, the accident occurred in Louisiana, and all witnesses and evidence are located in that state, this Court will transfer the action for the convenience of the parties and witnesses, in the interest of justice, to the Lincoln Parish, Western District of Louisiana, Shreveport Division, under Title 28 U.S.C. § 1404(a).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant Walmart Stores, Inc.'s, Motion to Dismiss for Lack of Personal Jurisdiction is hereby in all things DENIED.

IT IS FURTHER ORDERED that the Defendant Walmart Stores, Inc.'s, Motion to Transfer for Lack of Personal Jurisdiction based on Title 28 U.S.C. § 1406, *Cure or Waiver of Defects,* is hereby in all things DENIED.

IT IS FURTHER ORDERED that for the convenience of parties and witnesses, in the interest of justice, the above case SHALL be TRANSFERRED to the Lincoln Parish, Western District of Louisiana, Shreveport Division, pursuant to Title 28 U.S.C. § 1404(a).

SIGNED THIS 23rd DAY OF APRIL, 1992.

/s/ Sam B. Hall, Jr.
JUDGE SAM B. HALL, JR., PRESIDING

Mld APR 24, 1992 to:
Perry
Rasmussen
Balch
Johnson
Finn
Grajczyk

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

No. 93-737

In The

Supreme Court of the United States

October Term, 1993

KENT ANDREW FOLLETTE, JANE ELIZABETH FOLLETTE, INDIVIDUALLY AND AS NEXT FRIENDS OF ANDREW STEPHENSON FOLLETTE, A MINOR CHILD,

Petitioners,

v.

CLAIROL, INC. AND WAL-MART STORES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners, the Follettes, respectfully request that the Court grant their petition and hear their case.

I.

In an effort to harmonize the conflict between the various circuits, Respondents argue that the underlying statutes distinguish this case from the conflicting decisions in *Knowlton*[1] and *Bane*[2]. To accomplish this result, Clairol and Wal-Mart misrepresent the meaning of Tex. Bus. Corp. Act Ann. art. 8.02. From that statute, Respondents characterize the phrase – "as to all matters affecting the transaction of intrastate business in this state" – as a limiting factor on Texas' *in personam* jurisdiction over foreign corporations. There is no such limitation and no Texas court, state or federal, has interpreted this statute in such a manner. Article 8.02[3] reads in its entirety as follows:

> Art. 8.02. Powers of Foreign Corporation
>
> A. A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked in accordance with the provisions of the Act or until a certificate of withdrawal shall have been issued by the Secretary of State as provided in this

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[1] *Knowlton v. Allied Van Lines*, 900 F.2d 1196 (8th Cir. 1990)

[2] *Bane v. Netlink Inc.*, 925 F.2d 637 (3rd Cir. 1991)

[3] This provision is rooted in the Model Business Corporation Act

> Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; *and, as to all matters affecting the transaction of intrastate business in this State, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation* of like character and its officers and directors; provided, however, that only the laws of the jurisdiction of incorporation of a foreign corporation shall govern (1) the internal affairs of the foreign corporation, including but not limited to the rights, powers, and duties of its board of directors and shareholders and matters relating to its shares, and (2) the liability, if any, of shareholders of the foreign corporation for the debts, liabilities, and obligations of the foreign corporation for which they are not otherwise liable by statute or agreement. (emphasis ours)

Under nearly identical fact situations, two Texas decisions, *Goldman v. Pre-fab Transit Co.*, 520 S.W.2d 597 (Tex. Civ. App. – Houston [14th Dist.] 1975, no writ) and *Acacia v. Champlin Exploration, Inc.*, 769 S.W.2d 719 (Tex. Civ. App. – Houston [1st Dist.] 1989, no writ) used 8.02 as authority to confer jurisdiction and did not consider article 8.02 as, in any way, limiting personal jurisdiction to only intrastate matters. Neither the Fifth Circuit nor the Louisiana district court, in this case, found any such

jurisdictional restriction within the meaning of the statute.[4] The Fifth Circuit, in adopting the magistrate judge's Report and Recommendation, rendered its opinion purely on due process grounds. Consequently, there is no mention of article 8.02 impacting *in personam* jurisdiction in either opinion.

The phrase in question merely represents the statute's obedience to Congress' constitutional power over interstate commerce[5] and reflects Texas' desire to impose, within constitutional limits, the "same duties, restrictions, penalties and liabilities" on a foreign corporation as a domestic corporation of like character. That is all the statute says. The published comment of the Bar Committee – 1955 confirms such an interpretation. See Tex. Bus. Corp. Act Ann. art. 8.02, Comment of Bar Committee – 1955. See also *H. Rouw Co. v. Railway Exp. Agency*, 154 S.W.2d 143, 145 (Tex. App. El Paso 1941).

Likewise, in the context of Part Eight of the Texas Business Corporation Act, when taken as a whole, it is abundantly clear that *in personam* jurisdiction was never intended to be limited by article 8.02. There are numerous indications of this throughout the entire Act.

The most relevant statute, Texas Bus. Corp. Act Ann. art. 8.10, contains no words of limitation although it deals directly with the issue of service of process on a foreign corporation. See *Goldman* and *Acacia*, supra. Article 8.10B, however, does act to limit the personal jurisdiction of a

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[4] *Follette v. Clairol, Inc.*, 829 F. Supp. 840 (W.D.La.), *aff'd*, 998 F.2d 1014 (5th Cir. 1993) (table entry)

[5] U.S. Const. Art. 1 sec. 8 *cl.* 3.

withdrawing corporation. Thus, the Texas legislature certainly knew how to limit personal jurisdiction when it desired to do so. *cf. Knowlton,* supra.

Additionally, Tex. Bus. Corp. Act Ann. art. 8.01(B)(1) provides in pertinent part as follows:

> B. Without excluding other activities which may not constitute transacting business in this state, *a foreign corporation shall not be considered to be transacting business in this state,* for the purposes of this Act, by reason of carrying on in this state any one (1) or more of the following activities:
>
> (1) Maintaining or *defending* any action or suit or any administrative or arbitration proceedings, or effecting the settlement thereof or the settlement of claims or disputes to which it is a party. (emphasis ours)

This particular statute excepts litigation altogether from the definition of "transacting business" and together with Tex. Bus. Corp. Act Ann. art. 8.18 permits litigation involving foreign corporations and the *defending* of any lawsuits in Texas by both licensed and unlicensed foreign corporations:

> The failure of a foreign corporation to obtain a certificate of authority to transact business in the State shall not impair the validity of any contract or act of such corporation, and *shall not prevent such corporation from defending any action, suit or proceeding in any court of this State.*

Tex. Bus. Corp. Act Ann. art. 8.18B. (emphasis ours)

Of course, a more specific and controlling statute is Tex. Bus. Corp. Act Ann. art. 2.02 which enumerates those powers that a domesticated foreign corporation acquires from obtaining a license to do business:

> "A. Subject to the provisions of sections B and C of this Article, each corporation shall have power:
>
> . . . .
>
> (2) To sue and *be sued*, complain and *defend*, in its corporate name."

Tex. Bus. Corp. Act Ann. art. 2.02 (emphasis ours). See also V.T.C.A. Civil Practices and Remedies Code § 71.31. Moreover, the courts of Texas have specifically recognized article 8.02 as a "general" statute and even if it carried the meaning suggested by Respondents it would, under Texas law, give way to the more "specific" statutes mentioned above. The Texas courts have expressly recognized this principle. See *Amoco Production Co. v. Arendale*, 581 S.W.2d 755 (Tex. App. – Houston [14 Dist.] 1979).

In summary, article 8.02 simply does not, by either its language or plain meaning, limit Texas' *in personam* jurisdiction over a foreign corporation or distinguish this case from the *Knowlton* and *Bane* decisions. Article 8.02 is no more than a general statute granting admitted foreign corporations the same rights and privileges as domestic corporations and – *within appropriate constitutional limits* – imposing the same duties, restrictions, penalties and liabilities.

II.

Respondents also contend that *Neirbo v. Bethlehem Shipbuilding Co.*, 308 U.S. 165 (1939) has lost its vitality due to this Court's "teachings in recent jurisdictional cases." Apparently this lesson has not been learned by all federal courts. For example, the district court in *In Re Des Cases*, 789 F.Supp. 552 (E.D.N.Y. 1992) recently stated:

> Although the Supreme Court has not directly pronounced on the subject since 1945, the constitutionality of the traditional practice of asserting general jurisdiction solely on the basis of a corporation's being licensed to do business in the forum seems to have survived *International Shoe*. *See Burnham v. Superior Court*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (plurality opinion) (*International Shoe* did not supplant long-and widely-accepted methods of asserting jurisdiction); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174-75, 60 S.Ct. 153, 157-58, 84 L.Ed. 167 (1939) (upholding New York Corporation law requiring foreign corporation to designate agent for service of process as condition of doing business).

Id. at 591. See also *Manchester Knitted Fashions v. Amalgamated*, 967 F.2d 688 (1st Cir. 1992).

Neirbo remains viable because the reasoning and soundness of that decision is recognized and followed by our courts. For this additional reason, Petitioners request that this Court reaffirm the constitutional principles set forth in *Neirbo*.

CONCLUSION

In conclusion, the question before the Court still remains: Is the Due Process Clause violated by a state recognizing consent to "general" personal jurisdiction over a foreign corporation that obtains a license to do business and conducts business in that state? Petitioners suggest that the conflicting decisions of the various circuits and the far-reaching importance of this question demonstrate the need for resolution of this issue by the United States Supreme Court. The petition for a writ of certiorari should be granted and this question answered.

Respectfully submitted,

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